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REPORT
No. 97-417

VOTING RIGHTS ACT EXTENSION

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1992

with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

MAY 25, 1982.—Ordered to be printed

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(97th Congress)

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MAY 25, 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

[To accompany S. 1992]

The Committee on the Judiciary, to which was referred the bill (S. 1992) to amend the Voting Rights Act of 1965 to extend the effect of certain provisions and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill as amended do pass.

Senator Mathias filed the majority views of the Committee on the Judiciary.

I. INTRODUCTORY SUMMARY

The Committee on the Judiciary, to which was referred the bill (S. 1992) to amend the Voting Rights Act of 1965, to extend the special coverage provisions, to adopt a new procedure by which jurisdictions can bail out of coverage under the special provisions, to amend section 2, to extend the language assistance provisions for an additional seven years, and to add a section governing assistance to voters who are blind, disabled or unable to read or write, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The voting rights legislation which this Committee has considered is one of the most significant issues to come before this Congress. It has generated discussion not only in the Congress but throughout the Nation as well. This Committee has given the legislation detailed attention before coming to the conclusions reflected in this Report, which is the statement for the record of the intended meaning and operation of this bill.

Following the Committee Report on the bill are Additional Views and Minority Views of individual members.

II. PURPOSE

The objectives of S. 1992, as amended, are as follows: (1) to extend the present coverage of the special provisions of the Voting Rights Act, Sections 4, 5, 6, 7 and 8;[1] (2) to amend Section 4(a) of the Act to permit individual jurisdictions to meet a new, broadened standard for termination of coverage by those special provisions; (3) to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation of that section; (4) to extend the language-assistance provisions of the Act until 1992; and (5) to add a new section pertaining to voting assistance for voters who are blind, disabled, or illiterate.

Jurisdictions that meet the criteria set forth in Section 4(b) of the Act will continue to be subject to the special provisions of the Act until such time as they obtain a declaratory judgment granting termination of coverage as set forth in Section 4(a), as amended, but in any event not for a period exceeding 25 years.

The standard for bailout is also broadened by permitting political subdivisions in covered states, as defined in Section 14(c)(2), to bail out although the state itself remains covered. Under the new standard, which goes into effect on August 6, 1984, a jurisdiction must show, for itself and for all governmental units with its territory, that (1) for the 10 years preceding the filing of the bailout suit, it has a record of no voting discrimination and of compliance with the law; and (2) it has taken positive steps to increase the opportunity for full minority participation in the political process, including the removal of any discriminatory barriers.

S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile* v. *Bolden*.[2] The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White* v. *Regester*.[3]

This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. The new subsection also states that the section does not establish a right to proportional representation.

The language assistance provisions of Section 203 are extended for an additional seven years. In addition, a new subsection 208 is added, prescribing the method by which the voters who are blind, disabled, or illiterate are entitled to have assistance in a polling booth from a person of their own choosing, with two exceptions.

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[1] 42 U.S.C. 1973 et seq.
[2] 446 U.S. 55 (1980) (hereafter cited as "*Bolden*").
[3] 412 U.S. 755 (1973).

III. HISTORY OF LEGISLATION AND COMMITTEE PROCEEDINGS

The bulk of S. 1992 is virtually identical to legislation that was passed by an overwhelming margin by the House of Representatives in the fall of 1981. This Committee has reviewed the record of those proceedings, as well as the hearings of the Senate Subcommittee on the Constitution, in making its determinations on this legislation. Thus, a brief overview of the House proceedings is in order.

On May 6, 1981, the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee convened hearings on the Voting Rights Act. The Subcommittee heard testimony regarding the broad range of issues connected with the Act. The Subcommittee held 18 days of hearings, including regional hearings in Montgomery, Alabama, and Austin, Texas. Testimony was heard from over 100 witnesses. On July 21, 1982, the Subcommittee met and by unanimous voice vote ordered H.R. 3112 reported, without amendment, to the full Committee.

On July 28, 30, and 31, the full Committee on the Judiciary met to consider H.R. 3112. On July 31, the full Committee, by a vote of 23 to 1, ordered the bill reported to the House, with a single amendment in the nature of a substitute.

On October 5, 1981, H.R. 3112 was passed by the full House on a vote of 389 to 24. All contested floor amendments were defeated either by voice vote by wide margins on roll call vote, except for an amendment offered by Representative Fenwick pertaining to voter assistance for the blind and disabled.

H.R. 3112 was then placed directly on the Senate calendar. An identical bill, S. 1992, was introduced in the Senate by Senators Mathias and Kennedy and eventually cosponsored by an additional 63 Senators. S. 1992 was referred to the Judiciary Committee, and subsequently, the Subcommittee on the Constitution. Four other bills relating to the Voting Rights Act had also been referred to the Subcommittee. The Subcommittee held nine days of hearings, from January 27, 1982 to March 1, 1982, which are described in detail in the Subcommittee Report. On March 24, 1982, the Subcommittee met in executive session to consider S. 1992. Five amendments, offered in block, were adopted by the Subcommittee by a vote of 3–2. S. 1992, as amended, was then reported out of the Subcommittee by 5–0 vote. A Subcommittee Report, including the separate views of Senators Leahy and DeConcini was printed and made available to members of the full Committee.

On March 29, 1982, S. 1992 was briefly considered by the Committee, at which time a date certain was set for full Committee consideration. The Committee considered the measure on April 27, 28, 29, and May 4. Opening statements were given on April 27, 28, and 29. On May 4 the Committee voted on amendments, and ordered the bill, as amended, to be favorably reported.

The Committee first agreed to an amendment in the nature of a substitute for the Subcommittee bill. This amendment was offered by Senator Dole for himself and the sponsors of the original S. 1992, Senators Mathias and Kennedy, as well as Senators DeConcini, Grassley, Metzenbaum, Biden, and Simpson. The substitute amend-

ment reinstated most of the original text of S. 1992, but included three changes: (1) a further amendment to Section 2 of the Act; (2) a twenty-five year time limit on the special provisions of the Act; and (3) a new provision concerning the method by which voting assistance is provided to the blind, the disabled, and the illiterate. The substitute amendment was agreed to by a vote of 14–4.

A series of further amendments were then offered by Senator East. By a vote of 10–8, the Committee agreed to an East amendment relating to officials or agents of a voter's union assisting the blind, disabled, and illiterate in the polling booth under Section 5 of the substitute.

The Committee did not agree to the following East amendments:

1. An amendment that would have deleted the phrase "inability to read or write" from Section 5 of the substitute (defeated by a vote of 13–5);

2. An amendment that would have replaced the bailout criteria contained in Section 2 of the substitute (defeated by a vote of 12–6);

3. An amendment that would have prevented the existence of an at-large election system from being considered as evidence of a violation of Section 2 of the Act (defeated by a vote of 13–5);

4. An amendment that would have added sex discrimination as an activity prohibited under Section 2 of the Act (defeated by a vote of 16–2);

5. An amendment that would have added discrimination based on religion as an activity prohibited under Section 2 of the Act (defeated by a vote of 16–2);

6. An amendment that would have changed the venue prescribed under Section 5 of the Act (defeated by a vote of 12–6);

7. An amendment that would have changed venue for suits brought to enforce Section 2 of the Act (defeated by a vote of 14–4); and

8. An amendment that would have made Section 5 of the Act apply to every single political subdivision in the Nation (defeated by a vote of 13–5).

The Committee then ordered the bill to be favorably reported to the full Senate by a vote of 17–1.

IV. BACKGROUND: ORIGIN AND OPERATION OF THE VOTING RIGHTS ACT

The Committee bill will extend the essential protections of the historic Voting Rights Act. It will insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the future.

Seventeen years ago, Americans of all races and creeds joined to persuade the Nation to confront its conscience and fulfill the guarantee of the Constitution.

From that effort came the Voting Rights Act of 1965. President Lyndon Johnson hailed its enactment as a "triumph for freedom as huge as any ever won on any battlefield." The Act has attacked the shameful blight of voting discrimination.

As a result of the Voting Rights Act of 1965, hundreds of thousands of Americans can now vote and, equally important, have their vote

count as fully as do the votes of their fellow citizens. Men and women from racial and ethnic minorities now hold public office in places where that was once impossible.

Twice before, in 1970 and 1975, the crucial provisions of the Act have been extended. Each time the Act has come under attack. But each time, the Congress on a bipartisan basis has come to its rescue, with the support of Americans from every part of the country.

To appreciate the legacy of the Voting Rights Act and the need for its extension without unweakened, an understanding of its history is essential. Traditionally, black Americans were denied the franchise throughout the South. After statutory bars to voting by blacks were lifted, the main device was denial of voter registration—by violence, by harassment, and by the use of literacy tests or other screening methods. Civil rights groups and the Justice Department challenged those barriers repeatedly in the courts. The Civil Rights Acts of 1957 and 1960 authorized the Attorney General to seek injunctions, and the bills also established a complex process to enroll black voters.

But case-by-case litigation proved wholly inadequate. Justice Department attorneys were spread thinly among numerous lawsuits in many different jurisdictions. The Government had the burden of proof, and massive resources were required to document discrimination in each case. By the time a court enjoined one scheme, the election had often taken place, local officials had devised a new scheme, or both had occurred. The enforcement of the law could not keep up with the violations of the law.

Finally, after long frustration and in the fact of tenacious resistance, Congress affirmed our fundamental principles by passing the Voting Rights Act in 1965.

Overall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally. Thus, as Senator Javits put it, the purpose of the Voting Rights Act was "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination. . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs."[4]

The Voting Rights Act was designed to operate on two levels. First, it contained special remedies applicable to particular states or counties covered by the so-called trigger formula of Section 4. If in the 1964, 1968, or 1972 presidential elections a jurisdiction had a literacy test or similar device and if less than half of its electorate was registered or voted, then the jurisdiction was covered under Section 4. The use of "tests or devices" was suspended and the Attorney General was authorized to send in federal examiners to register voters or federal observers to monitor the conduct of elections. This section was based on the recognition that specific practices and procedures—literacy tests and similar devices—had been used to prevent blacks from participating in the electoral process.

The Act also required covered jurisdictions to preclear any changes in voting or election laws with either the Attorney General or a Fed-

[4]111 Cong. Rec. 8295 (1965).

eral court in the District of Columbia. The Attorney General or the court was required to withhold approval until the submitting jurisdiction shows that the change will not be discriminatory in purpose or effect. This provision was designed to insure that old devices for disenfranchisement would not simply be replaced by new ones. Through this remedy Congress intended to provide an expeditious and effective review to insure that devices other than those directly addressed in the Act (literacy tests and the poll tax would not be used to thwart the will of Congress to secure the franchise for blacks.

The second level on which the Act operated was a general prohibition of discriminatory practices nationwide. Where discrimination was shown, the Attorney General might ask the court to impose the same remedies—examiners, observers, a ban on test or devices, and preclearance of new laws—that applied automatically to areas covered by the Section 4 trigger.

The initial effort to implement the Voting Rights Act focused on registration. More than a million black citizens were added to the voting rolls from 1965 to 1972. It is not surprising, therefore, that to many Americans, the Act is synonymous with achieving minority registration. But registration is only the first hurdle to full effective participation in the political process. As the Supreme Court said in its interpretation of the Act:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.[5]

Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.

Congress anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts. Upholding the constitutionality of Section 5, the Supreme Court noted:

> Congress knew that some of the States covered by section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for discrimination contained in the Act itself.[6]

Allen and *Perkins* v. *Mathews*[7] held that preclearance applied to any change in the law which could, even in subtle or indirect ways, infringe the right of minority citizens to vote and to have their vote fully

[5] *Allen* v. *Board of Elections*, 393 U.S. 544, 569 (1969).
[6] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966).
[7] 400 U.S. 379 (1971).

count, e.g., gerrymandering or abolition of elective posts. The report of the Subcommittee on the Constitution suggested that this judicial application of preclearance under Section 5 improperly strayed from the original intent of Congress.[8] However, the legislative history of Section 5, as well as the careful and persuasive analysis of the history which the Supreme Court has made, fully refutes that suggestion.

Once the Supreme Court made clear that Section 5 required review of any new laws in covered areas that could directly or indirectly impair the right to vote, Section 5 became the main target of legislative efforts to undermine the Act.

Each time that Congress has continued the special coverage of the Voting Rights Act the argument was made that Section 5 was no longer needed. Congress has had to balance a record of some progress against strong evidence of continuing discrimination. And each time Congress has decided to retain Section 5.

1970 Extension

In 1969 and 1970, as the five-year period of coverage under the special provisions was nearing its end, Congress undertook a detailed and searching examination, including 14 days of hearings in the House and Senate, of the record of developments under the Act. Congress was aware that there had been general progress in registration and voting but that there was much more to be done. While the covered jurisdictions were now complying with the literacy test suspension of Section 4, there was widespread and growing violation of Section 5, through increased use of the dilution methods addressed by the Supreme Court in *Allen* and *Perkins*.[9] Moreover, there had been widespread ignoring of the preclearance requirement. Thus, as the Senate Judiciary Committee stated at the time:

> If it had not been for Section 5 of the present Act, there is no telling to what extent the states and communities covered might have legislated and manipulated to continue their historical practice of excluding Negroes from the Southern political process.
>
> We also take note of the recent decision of the Supreme Court in *Allen* v. *Board of Elections* in which the Court discussed the history of the enforcement of Section 5 and clarified its scope. The decision underscores the advantage of Section 5 procedures in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color.[10]

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[8] Report of the Senate Subcommittee on the Constitution on S. 1992 (April, 1982), 13–15 (hereafter cited "Subcommittee Report".) Moreover, in both 1970 and 1975, the Congress renewed section 5 with full awareness of its interpretation by the courts to include dilution and other evasive mechanisms, as well as outright denials of the opportunity to register or vote. Not only has Congress twice ratified this interpretation of the intended scope of Section 5 and rejected arguments that the section was excessively broad, but also it is noteworthy that 75 of the members of the Senate who acted on the extension in 1970 had also been members in 1965 when Section 5 was first enacted.

[9] The definition of "test or device" under Section 4 is quite narrow, being limited to tests that condition registration on literacy, understanding, educational achievement, good moral character, or voucher of another voter. It is thus easy for a jurisdiction to engage in massive discrimination without having to use a prohibited "test or device."

[10] Joint Views of Ten Members of the Judiciary Committee, 91st Cong., 2nd Sess. See 115 Cong. Rec. S. 5521, March 2, 1970.

Those ten members of the Committee, including Senators Hugh Scott and Robert Griffin, sponsored the Scott-Hart extension of the Act which became law. The Supreme Court has cited their views as the committee report on the bill which was enacted. Seven of the ten Senators had been sponsors in 1965 of S. 1564, the bill enacted as the Voting Rights Act.

In August 1970, Congress passed the Voting Rights Act Amendments of 1970 (Public Law 91–285), which extended coverage of Section 5 and the other special provisions of the Act for an additional five years for the jurisdictions whose coverage was triggered by the 1965 Act. Congress also brought under the Act's special coverage states and political subdivisions that maintained a test or device on November 1, 1968, and that had less than a 50 percent turnout or registration rate for the November 1968 presidential election.[11] Lastly, it established a five-year nationwide ban on the use of literacy tests or other devices.

Developments after the 1970 Extension

In the period following the 1970 extension of the Act, a number of cases were decided by the Supreme Court that clearly delineated how the Voting Rights Act was to work. These decisions were consistent with Congress' intentions in passing the Act and extending it. Among these decisions were *Georgia* v. *United States*,[12] *Perkins* v. *Mathews* [13] and *Connor* v. *Waller*.[14] During this period, the Attorney General also adopted regulations to provide guidance for covered jurisdictions, and these guidelines were upheld in *Georgia* v. *United States*. These cases carried out Congress' intention in broadly covering voting changes while allowing the legitimate processes of government to go on. For example, the Supreme Court upheld interpretations of Section 5 that permitted legitimate annexations, while minimizing their diluting qualities by requiring modification of electoral systems where annexations took place.

1975 Extension

In 1975, Congress again faced the situation it had observed in 1970. While most jurisdictions had complied with Section 4 for ten years by not using tests or devices, there had nonetheless been widespread violation of the Act and widespread voting discrimination in the covered jurisdictions. Twenty days of hearings in the House and Senate confirmed the continued need for the preclearance remedy. As the Senate report pointed out:

> The recent objections entered by the Attorney General of the United States to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength. Such other measures may include switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans.[15]

Once again, Congress continued the preclearance requirement for the jurisdictions originally covered in 1965, not on the basis of some permanent stigma for events which had occurred before 1965, but rather

[11] Jurisdictions so affected included: 3 counties (Bronx, Kings and New York counties) in New York; one county in Wyoming; 2 counties (Monterey and Yuba counties) in California; eight counties in Arizona; four Election Districts in Alaska, and towns in Connecticut, New Hampshire, Maine, and Massachusetts.

[12] 411 U.S. 526 (1972) (reapportionments covered by Section 5).

[13] *Supra*, (annexations covered by Section 5).

[14] 421 U.S. 656 (1975) (changes in law may not be implemented without preclearance).

[15] Senate Committee on the Judiciary, Report on the Voting Rights Act Extension, S. 1279, S. Rept. 94–295, 94th Cong., 1st. Sess. at 16–17 (1975).

on the basis of a careful review of the contemporaneous record of ongoing voting rights discrimination in 1970 and 1975, respectively.

In August of 1975, Congress extended the Voting Rights Act of 1965 for 7 years, so that jurisdictions originally subject to the special provisions of the Act remained covered until August 6, 1982. Congress also made permanent the nationwide ban on literacy tests and other devices, which it had imposed on a temporary basis in 1970.

In addition, based on an extensive record filled with examples of the barriers to registration and effective voting encountered by language-minority citizens in the electoral process, Congress expanded the coverage of the Act to protect such citizens from effective disfranchisement.

Specifically, Congress amended the definition of "test or device" to include the use of English-only election materials in jurisdictions where a single language minority group comprised more than 5 percent of the voting-age population. It then extended coverage of the Act to those jurisdictions which had used a test or device as of November 1, 1972, and had registration or voter turnout rates less than 50 percent.[16]

Moreover, Congress required that language assistance be provided throughout the electoral process where members of a single language minority comprise more than 5 percent of the voting-age population and the illiteracy rate of such persons as a group is higher than the national illiteracy rate.[17]

Finally, Congress amended Section 2 of the Voting Rights Act—the general prohibition against voting discrimination nationwide—to cover discrimination based on membership in a language minority group. In adopting this amendment, Congress indicated that the basis for this expanded Section 2 was not only the Fifteenth Amendment, but also the Fourteenth as well.

V. THE CONTINUING NEED FOR SECTION 5 PRECLEARANCE

In the Committee's view the extensive hearing record complied by the Senate and the House Judiciary Committees demonstrates conclusively that the Act's preclearance requirement must be continued.

There is virtual unanimity among those who have studied the record that Section 5 preclearance should be extended. The Subcommittee on the Constitution was unanimous on this point. As the Subcommittee Report noted, "nearly every witness acknowledged some need for the continuance of Section 5 coverage." [18] The Committee's analysis of the performance of the covered jurisdictions in recent years constitutes the basis for our conclusion that Section 5, as well as the other special provisions, remain necessary and appropriate legislation to ensure

[16] Jurisdictions meeting this trigger and thus subject to the special provisions of the Act, including preclearance, were the States of Alaska, Arizona and Texas; 2 counties in California; 1 county in Colorado; 5 counties in Florida; 2 townships in Michigan; 1 county in North Carolina; and 3 counties in South Dakota.

[17] Jurisdiction covered under this second trigger were; all 143 counties in Texas; all 32 counties in New Mexico; all 14 counties in Arizona; 39 counties in California; 34 in Colorado; and 25 in Oklahoma.

[18] Subcommittee Report at 53.

the full enforcement of the rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution.[19]

Although we have come a long way since 1965, the nation's task in securing voting rights is not finished. Continued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial safeguards now.

The Committee is equally concerned about the risk of losing what progress has already been won. The gains are fragile. Without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices.[20]

Extent of Objections

The extent of objections under Section 5 has remained substantial. While some progress continues to be made, racial and language minority discrimination affecting the right to vote persists throughout the jurisdictions covered by the Section 5 preclearance requirement. All too often, the background of rejected submissions—the failure to choose unobjectionable alternatives, the absence of an innocent explanation for the proposed change, the departure from past practice as minority voting strength reaches new levels, and, in some instances, direct indications of racial considerations—serves to underline the continuing need for Section 5.

A review of the kinds of proposed changes that have been objected to by the Attorney General in recent years reveals the types of impediments that still face minority voters in the covered jurisdictions. Among the types of changes that have been objected to most frequently in the period from 1975–1980 are annexations; the use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines.[21]

This reflects the fact that, since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct, over impediments to the right to vote to more sophisticated devices that dilute minority voting strength.[22]

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[19] U.S. Constitution, Fourteenth Amendment, Section 5, Fifteenth Amendment, Section 2. Thus the legislative extension of Section 5 is fully consistent with the requirement that it be based on "Congress' considered determination," after reviewing the recent and contemporeaneous record ,that it remains necessary to "preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." *City of Rome* v. *United States* 446 U.S. 156, 182 (1980).

[20] Professor C. Vann Woodward, one of America's leading Southern historians, told in graphic detail how quickly the gains in voting rights made a century ago were wiped out, and said "(m)y history teaches me that if it can happen once, it can happen again." House Hearings p. 2027.

[21] Report of the United States Commission on Civil Rights, (Civil Rights Commission Report), "The Voting Rights Act: Unfulfilled Goals," p. 65, 1981. *See also e.g.* Report of the Lawyers Committee for Civil Rights Under Law, "Voting in Mississippi: A Right Still Denied ("Lawyers Committee Mississippi Report") particularly the breakdown of objections in Mississippi from 1965–1980. In her testimony before the Subcommittee on the Constitution, January 27, 1982, at 6–7, ("Senate hearings") Vilma Martinez, President of the Mexican-American Legal Defense and Education Fund, noted 85 proposed changes from Texas which were objected to by the Department of Justice, despite the fact Texas was not brought under the Act until 1975. The objections were in response to proposed changes submitted by jurisdictions throughout the entire state of Texas.

[22] This trend should not be taken to mean that more blatant direct impediments to voting are no longer utilized. Both the House and Senate hearing records contain examples of direct efforts to bar minority participation, including physical violence and intimidation of voters and candidates, discriminatory manipulation of voters, reregistration requirements and purging of voters, changing the location of polling places and insistence on retaining inconvenient voting and registration hours. House Report No. 97–227, pp. 11–21 and testimony before the Senate Judiciary Subcommittee on the Constitution by Ruth J. Hinerfeld, President, League of Women Voters, January 27 ,1982 at 18 and Lawyers Committee Mississippi Report, at 13.94 (intimidation, inconvenient registration locations and hours, changes in polling places); and Senate hearings, testimony of Abigail Turner (reidentification plan), February 2, 1982 at 2–7 Vilma Martinez, before the House Judiciary Subcom-

footnote continued on p. 11.

Some examples of changes objected to by the Department of Justice since the last extension of the Act are illustrative: [23]

Holly Springs, Mississippi, a majority black city, redrew its four districts. The new plan drastically reduced minority voting strength. Most of the black residents were put into two overpopulated (and therefore underrepresented) districts, while most of the whites were put into the other two districts, which were underpopulated. The Attorney General objected in 1981.[24]

The Burleson County, Texas Hospital District eliminated 12 of its 13 polling places, leaving the only remaining polling place 19 miles from the area where black voters were concentrated and 30 miles from the area of concentration of Mexican-American voters. The Attorney General objected in 1981.[25]

In January 1980, the De Kalk County, Georgia, Board of Registration adopted a policy that it would no longer approve community groups' requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites. A lawsuit was required to make the county submit the change, and the Attorney General objected.[26]

North Carolina drew a congressional districting plan that minimized the voting strength of black voters in the Durham area. The Attorney General objected in 1981, noting that the plan not only had a discriminatory effect but also appeared to have a discriminatory purpose.[27]

In 1981, Petersburg, Virginia, drew a redistricting plan that virtually insured white control even though blacks make up 61 percent of the city. On submission to the Attorney General, an objection was entered under Section 5, pointing out that the effect—as well as the purpose (as shown by white council members' statements)—of the plan was discriminatory.[28]

In 1979 the Department of Justice objected to a South Dakota law that would have nullified the effect of a judicial decision [29] that gave the residents of two unorganized counties—whose populations are predominantly Indian—the right to vote for county officials in the organized counties to which they are attached.

On October 27, 1981, the Attorney General objected to the portion of the New York City Council redistricting plan, concerning the three counties covered by section 5—New York (Manhattan), Kings (Brooklyn) and Bronx, because the gerrymandered districts discriminated against black and Hispanic voters.[30]

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footnote [22] continued.

mittee on Civil and Constitutional Rights, June 18, 1981, at 1878, 1895 ("House hearings") (polling places); House Hearings, testimony of Rolando Rios, May 6, 1981 at 42 (Intimidation); the Senatae hearings testimony of Vilma Martinez, January 27, 1982, at 5–6 (purging). Civil Rights Commission Report. The Commission sets out numerous examples of such impediments to minority candidates and their supporters (pp. 59–61); harassment and intimidation in registration (pp. 22–24); purging and reregistration (27–28); polling places (29–31; and harassment and intimidation in voting (34–35).

[23] The list of section 5 objections was contained in the Appendix to the testimony of American Legal Defense and Education Fund, note d85 proposed changes from Texas which

[24] See House Hearings, p. 1835.

[25] See House Hearings, p. 1849.

[26] Report by the American Civil Liberties Union, "Voting Rights in the South" [hereinafter cited as "ACLU Report"], p. 54–55.

[27] Objection letter of William Bradford Reynolds, Assistant Attorney General, to Alex K. Brock, Dec. 7, 1981.

[28] Objection letter of William Bradford Reynolds, Assistant Attorney General, to John F. Key, Jr., March 1, 1982.

[29] *Little Thunder* v. *State of South Dakota*, 518 F.2d 1253, 1256 (8th Cir. 1975).

[30] Letter of Wm. Bradford Reynolds, Assistant Attorney General, to Fabian Palomino, October 27, 1981.

Many of the practices to which objections have been entered are complex and subtle. Sophisticated rules regarding elections may seem part of the everyday rough-and-tumble of American politics—tactics used traditionally by the "ins" against the "outs." Viewed in context, however, the schemes reported here are clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination and to undermine the gains won under other sections of the Voting Rights Act.

The breadth of the continuing problem is perhaps best shown by the section 5 objections to statewide redistricting plans following the 1980 census. In the past year the Attorney General has objected to statewide plans in Virginia (State House and Senate), Arizona (State House and Senate), North Carolina (State House, Senate and Congressional districts), South Carolina (State House), Georgia (State House, Senate and Congressional districts). Alabama (State House and Senate), Mississippi (Congressional districts), and Texas (State House, Senate and Congressional districts). In some of these cases successive plans have been submitted and rejected several times.[31]

Non-Compliance

In addition to the continuing level of objectionable voting law changes, disappointing gaps in compliance with Section 5 are significant evidence of the continuing need for the preclearance requirement.

Non-compliance generally has taken two forms. First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. Second, there continue to be instances of changes having been implemented despite a prior Department of Justice objection.

The Subcommittee on the Constitution received testimony detailing the extent of non-compliance with the Act by covered jurisdictions. A representative of the Southern Regional Council testified that his organization's research showed that "since 1965 in six Southern states as many as 750 state enactments affecting voting have been passed by state legislatures and have not been submitted for review under section 5.[32]

The witness also testified that "the failure of local governments to submit changes in practices and policies that they adopt on the local

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[31] The continuing problem with reapportionments is one of the major concerns of the Voting Rights Act. As we have recognized before, even when changes are made for valid reasons, for example, reapportionment or home rule, "jurisdictions may not always take care to avoid discriminating against minority voters in the process." S. Rept. No. 94–295, p. 18 (1975), quoted in *McDaniel* v. *Sanchez*, 452 U.S. (1981).

Under the rule of *Beer* v. *United States*, 425 U.S. 130 (1976), a voting change which is ameliorative is not objectionable unless the change "itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141; see *also* 142 n. 14 (citing to the dilution cases from *Fortson* v. *Dorsey* through *White* v. *Regester*). In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.

In analyzing submissions, the Attorney General has correctly taken the position that the immediately preceding plan is not necessarily the standard against which to measure retrogression if that plan was precleared without the appropriate section 5 review. *See* objection to Mississippi reapportionment plan, March 30, 1982. The same should also hold true if the prior plan was precleared under standards that no longer apply. Compare *Whitcomb* v. *Chavis*, 403 U.S. 124, 162–63 (1971). This rule is in keeping with the Attorney General's statement that redistricting submissions under section 5 are to be treated on a case-by-case basis, "in the light of all the facts." Letter from AAG Reynolds to Chairman Hatch, February 25, 1982.

[32] Senate hearings, statement of Steven Suitts, Executive Director, Southern Regional Council, February 1, 1982 at p. 3. These States are: Alabama, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina. While North Carolina, as a State, is not subject to section 5, the legislation in question affected North Carolina counties which are covered and, therefore, it should have been precleared.

level affecting voting may be as prevalent, if not more widespread, than the pattern of non-compliance of state governments in the South." [33]

During the course of its hearings, the Subcommittee received numerous examples of non-submissions. Typical of these are:

> Seven Georgia counties—Calhoun, Clay, Dooly, Early, Miller, Morgan, and Seminole—shifted from district to at-large elections between passage of the Voting Rights Act and 1971, and none of them submitted their changes for preclearance. In six of the seven counties (all except Seminole) litigation was required to get the change submitted.[34]

> In the three years following passage of the Voting Rights Act, the city of Indianola, Mississippi reduced the proportion of its black population by more than 30% through annexation of outlying white areas while refusing contemporaneous request to annex 11 adjoining predominantly black subdivisions. These predominantly black subdivisions receive city services but are excluded from voting for city officials. Not one of the annexations was ever submitted for preclearance. In 1981 the district court held the city in violation of the Voting Rights Act.[35]

> In 1968, Haneyville, Alabama was incorporated with strangely shaped borders that made it 85 percent white—in a 77 percent black county yet this change was not submitted for a decade. When it was finally submitted, the Attorney General objected on the ground that the incorporation had been discriminatory because the surrounding black areas had been excluded.[36]

At least as disturbing as such failures to preclear changes is the frequency with which jurisdictions refuse to comply with Section 5 after objections are entered. The law is unambiguous: a Section 5 objection is final and binding unless a contrary judgment is obtained from a three-judge court in the District of Columbia.[37] Nonetheless, many jurisdictions have simply refused to obey the law. For example:

In Robeson County, North Carolina, the Lumberton City Board of Education completed three annexations between 1967 and 1970. No submission was made until a written request came from the Attorney General in 1974. The Attorney General objected to the changes on June 2, 1975, after finding strong indications of a racially discriminatory purpose behind the annexations, but the Board continued to hold elections for the Board of Education under the three annexations, until an injunction was entered in 1981, six years after the objections.[38]

> In 1974, Pike County, Alabama, submitted a proposal to change from a single member district election system for county commissioners to an at-large election system with a residency requirement. The Department of Justice objected. Pike County nevertheless proceeded with elections under the at-large system in 1976 and 1978, until the Department of Justice filed a civil

[33] Suitts, at p. 6.
[34] ACLU Report at 42.
[35] Lawyer's Committee Mississippi Report, at 87–88.
[36] Senate Hearings, Statement of Abigail Turner, p. 13–14.
[37] *Canaday* v. *Lumberton City Board of Education*, 102 S. Ct. 494 (1981); see also *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642 (1977).
[38] ACLU Report at 53–54.

suit to restrain county officials from ignoring the section 5 objection.[39]

Sumter County, South Carolina, adopted at-large elections in 1967 and never submitted the change until 1976, when the adoption of the home rule law led it to submit the change, to which the Attorney General objected. The objection has still not been enforced.[40]

In Texas, in order to prevent the implementation of a number of plans to which the Justice Department had objected, it was necessary for private plaintiffs to file suit.[41]

These examples of recent section 5 objections and non-compliance represent only a small fraction of those that were brought to the attention of this Committee and the House of Representatives.

In the Committee's view, this record compels the conclusion that the pre clearance remedy is still vital to protecting voting rights in the covered jurisdictions and that its enforcement should be strengthened. This conclusion is strengthened by the realization that the abuses which take the form of voting changes which are not submitted or which draw objections from the Attorney General are only the tip of the iceberg. Types of abuses (apart from changes) range broadly from intimidation and harassment to discouragement of registration and voting, to maintenance of discriminatory election procedures.[42] Complaints of discrimination have also been reflected in judgments and consent decrees in voting discrimination lawsuits, as well as in the instances where the Justice Department has found it necessary to designate federal examiners, either for registration or to accompany federal observers.

The Committee expects that this extension of Section 5 will result in greater compliance with the Act, including a reduction in the number of objections, non-submissions, and changes implemented following an objection, because of the added incentive to comply provided by the revised bailout procedures.[43]

The Committee considered and rejected suggestions that the Section 5 preclearance provision be extended to every single jurisdiction of the nation. In our view, this concept of nationwide preclearance misconceives the basic thrust of the preclearance provision and overlooks other provisions of the Act that already apply throughout the country. If enacted, "nationwide preclearance" would raise serious practical and constitutional problems.

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[39] Civil Rights Commission Report at 73.

[40] *Blanding* v. *Dubose*, 50 U.S.L.W. 3543 (Jan. 11, 1982).

[41] House hearings, Testimony of Joaquin Avila, Mexican-American Legal Defense and Education Fund, June 5, 1981, at 934.

[42] One common problem is discriminatory registration, which was common in Mississippi a decade ago and which has reappeared in recent years, especially in Alabama. These situations combine a number of problems, including use of reregistration procedures not shown to be necessary and administered in ways that make it difficult for blacks to register, and which even purged the rolls of voters listed by federal examiners—in direct violation of the Voting Rights Act.

[43] The Committee also anticipates the collateral benefit that past non-compliance which is still outstanding and unremedied will be uncovered and corrected. Thus, Drew Days, former Assistant Attorney General, Civil Rights Division, informed the Committee that the Department of Justice sometimes learns of non-submitted changes several years after they were in fact implemented. Professor Days stated that "(e)xtention of the Act should increase the likelihood that existing non-compliance with the law will be uncovered and remedied for the betterment of minority voters." Professor Days cited the example of the City of Greenville, Pitt County, North Carolina, where the Department only learned of prior changes when the jurisdiction sought preclearance of subsequent changes several years later. Statement of Drew Days, September 12, 1982 at 6–7.

First, the suggestion that we should consider "nationwide" preclearance is misleading. The existing preclearance provision was based on a formula tailored to meet problems of voting discrimination wherever they occur. The provision is not limited to any particular region of the country. To the contrary, it now applies to literally the four corners of America: from counties in Hawaii and Alaska, to parts of New England and Florida. In fact, more people are protected in three covered counties in New York than in most of the Southern states. The recent objections to proposed changes in New York City, Arizona and South Dakota underscore the fact that the preclearance provision does not set a double standard for different regions of the Nation.

Second, the Voting Rights Act already contains a number of provisions that apply literally in every jurisdiction throughout the land. Most important, Section 2—the Act's general prohibition against voting discrimination—applies to every state and county. The revised version of Section 2 contained in this bill could be used effectively to challenge voting discrimination anywhere that it might be proved to occur. The Act also contains a provision allowing a court to order preclearance in a state or political subdivision not presently covered by the triggering formula.[44]

In addition, enactment of Nationwide preclearance would be an administrative nightmare for the Department of Justice. It would overload the system. As Representative Hyde vividly put the problem during the House hearings, "[i]t (Nationwide preclearance) would strengthen the Act to death." [45] It is already difficult for the Department to enforce the existing preclearance provisions with limited resources. The Department's burden would be increased dramatically if it were required to review proposed changes from every single state and political subdivision not now covered under Section 5.[46]

Finally, in the Committee's view, there is a serious question of whether or not nationwide preclearance would be constitutional. As noted eleswhere,[47] the Supreme Court upheld the Act's triggering formula in large part because of the extensive Congressional findings of voting discrimination in the covered jurisdictions. It is doubtful that the Supreme Court would sustain the extension of this "uncommon exercise of Congressional power" in the absence of a similarly detailed record of voting discrimination nationwide.[48]

VI. AMENDMENT TO SECTION 2 OF THE VOTING RIGHTS ACT

A. Overview: Proposed Amendment to Section 2

The proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*.

[44] Under Section 3(c) of the Act, if a federal district court makes a finding of a Fourteenth or Fifteenth Amendment violation, it may order preclearance with the Attorney General or local district court of any proposed changes. Two counties—Escambia County, Florida and Thurston County, Nebraska, are covered by the preclearance provisions of Section 3(c) as the result of court order. Letter of Wm. Bradford Reynolds, Assistant Attorney General to Senator Orrin G. Hatch, January 6, 1982 at 5.

[45] House hearings at 28.

[46] See House hearings, testimony of Drew Days, July 13, 1981 at 2121.

[47] See Section VI. G., pp. 93–100, *infra*.

[48] This issue is quite distinguishable from the constitutionality of clarifying the standard for establishing a violation under Section 2. *Id.*

In pre-*Bolden* cases plaintiffs could prevail by showing that a challenged election law or procedure, in the context of the total circumstances of the local electoral process, had the result of denying a racial or language minority an equal chance to participate in the electoral process. Under this results test, it was not necessary to demonstrate that the challenged election law or procedure was designed or maintained for a discriminatory purpose.

In *Bolden*, a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose. The Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial injury from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.

In our view, proof of discriminatory purpose should not be a prerequisite to establishing a violation of Section 2 of the Voting Rights Act. Therefore, the Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process, i.e., by meeting the pro-*Bolden* results test.

In reaching this judgment, the Committee has made several key findings as detailed in the following parts of this section:

Requiring proof of a discriminatory purpose is inconsistent with the original legislative intent and subsequent legislative history of Section 2. (Part B)

The *Bolden* litigation marked a radical departure from both Supreme Court and lower federal court precedent in voting discrimination cases. (Part C)

Electoral devices, including at-large elections, per se would not be subject to attack under Section 2. They would only be vulnerable if, in the totality of circumstances, they resulted in the denial of equal access to the electoral process. While the presence of minority elected officials is a recognized indicator of access to the process, the "results" cases make clear that the mere combination of an at-large election and lack of proportional representation is not enough to invalidate that election method. (Part D)

The "results" test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions. This test will provide ample guidance to federal courts when they are called upon to review the validity of election laws and procedures challenged under Section 2. Both the Supreme Court and lower federal court decisions make clear that there is no right to proportional representation. In case after case, the court expressly rejected proportional representation, and the disclaimer in Section 2 codifies this judicial disavowal. (Part E)

The intent test focuses on the wrong question and places an unacceptable burden upon plaintiffs in voting discrimination cases. (Part F)

The proposed amendment to Section 2 is well within Congress' constitutional authority. It is not an effort to overrule a Supreme

Court interpretation of the Constitution, rather it provides a statutory prohibition which the Congress finds is necessary to enforce the substantive provisions of the 14th and 15th Amendments. (Part G)

B. The Original Legislative Intent as to Section 2

The Committee amendment rejecting a requirement that discriminatory purpose be proved to establish a violation of Section 2 is fully consistent with the original legislative understanding of Section 2 when the Act was passed in 1965.

Advocates of an intent requirement for Section 2 cite statements in the legislative history of the 1965 Act to the effect that Section 2 was designed to track the Fifteenth Amendment, whose wording it follows. They suggest that the Fifteenth Amendment has always been understood to require proof of discriminatory purpose. They claim that, inasmuch as Congress chose to track the Fifteenth Amendment, Congress also must have sought to impose an intent standard in section 2. This they argue that the Committee amendment is not consistent with the original understanding of Section 2.

Whether the Fifteenth or Fourteenth Amendment were understood by Congress in 1965 to embody an intent requirement is ultimately of limited relevance.[49] However, the Committee has examined the legislative history of the 1965 enactment, relevant legislative history from the 1970 extension of the Act, and the general understanding in 1965 of what was required to establish a Fifteenth Amendment violation. We find no persuasive evidence to support the argument outlined above that Congress made proof of discriminatory purpose an essential requirement of section 2 when it was first enacted.

During the hearings on the Voting Rights Act of 1965, Attorney General Katzenbach testified that section 2 would ban "any kind of practice . . . if its *purpose or effect* was to deny or abridge the right to vote on account of race or color." [50]

This statement is not a stray remark in the extensive proceedings that led to the Act's passage. It is the most direct evidence of how the Congress understood the provision, since Congress relied upon the Attorney General to explain the meaning and operation of this Executive Branch initiative.[51]

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[49] While the Committee finds that Congress did not seek to include an intent test in the original provision of section 2, a plurality of four justices in *City of Mobile* v. *Bolden*, 446 U.S. 55, 60–61 (1980) thought that it did. The Court is the ultimate interpreter of laws once enacted. But in any event, there is no question that Congress may now decide that an intent requirement is inappropriate for section 2, and amend statute to make that point clearly. Congress has the constitutional power to do so. See Section VI, G, *infra* at pp. 96–98.

[50] "Senator Fong. . . . 'Mr. Attorney General, turning to section 2 of the bill . . . there is no definition of the word "procedure" here. I am a little afraid that there may be certain practices that you may not be able to include in the word "procedure." For example, if there should be a certain statute in a State that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word "procedure." Could you?' Attorney General Katzenbach. 'I would suppose that you could if it had that purpose. I had thought of the word "procedure" as including any kind of practice of that kind if *its purpose or effect* was to deny or abridge the right to vote on account of race or color.' " Hearings on S. 1564 before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., 191 (1965) (emphasis added).

[51] While no single statement can be conclusive, the Supreme Court has pointed out that the Attorney General played an "extensive role" in drafting the Act and explaining its operation to Congress, *United States* v. *Bd. of Comm'rs Sheffield*, Ala. 435 U.S. 110, 131 (1978), and his contemporaneous interpretation of the Act is "persuasive" and should be accorded "great deference." *Ibid.*, at 131–32; *Perkins* v. *Matthews*, 400 U.S. 379, 391 (1971). Indeed, the Supreme Court specifically singled out and cited this exchange with Senator Fong as an example of the Attorney General's role in stating the understood meaning of the provisions of the Act. *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 n. 31 (1969).

It is true that Section 2 originally had no reference to a results or effects standard, while Section 5 does. But as Senator Specter noted at the hearings, that argument proves nothing, inasmuch as Section 2 is also silent as to any intent standard, and Section 5 refers to proof of both discriminatory purpose and discriminatory effect.[52]

Throughout the hearings and floor debates there were statements equating discriminatory "effects" with a denial or abridgment of the right to vote.[53] Moreover, there has been no citation of any point in the hearings or debates which suggests that either the proponents or the opponents of Section 2 thought that it reached only purposeful discrimination.[54]

The legislative history of the 1970 extension of the Act confirms that Congress had not meant to limit the original Section 2 to situations in which discriminatory intent was proved.

In 1970, then Attorney General John Mitchell proposed repealing Section 5, offering in exchange new language explicitly authorizing the Attorney General to bring suit anywhere in the country to challenge any practice

> which has the *purpose or effect* of denying or abridging the right to vote on account of race or color. . . .[55]

The Senate Judiciary Committee rejected his proposal on the *ground that it added nothing to the Act.* The *Views* stated that

> The Attorney General *already has the authority to bring such suits* [under section 2].[56]

In 1973 the Fifth Circuit, in an *en banc* opinion by then Judge Griffin Bell, ruled that proof of discriminatory purpose was not required under section 2 of the Voting Rights Act.[57]

In the fall of 1980, based on a review of the same legislative history, the Attorney General also took the position that section 2 did not require proof of intent.[58]

Turning to the Constitutional context in which Section 2 was first enacted, the Committee finds that it was different from the situation that the Congress now faces after *Bolden.* It is important to avoid the fallacy of assuming the two situations are the same. It is true that in light of the 1980 *Bolden* decision, the Congress *now* must decide whether to have Section 2 continue to be coextensive with the Fifteenth and Fourteenth Amendments, or whether to maintain Section 2 as a provision available in situations where discriminatory intent is not proved. Today, Congress faces that choice, but it did not in 1965.

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[52] Spelling out both alternative standards in section 5 makes sense because of the unusual burden of proof placed upon the submitting jurisdiction to satisfy each of them in order to obtain preclearance.

[53] E.g. Hearings on H.R. 6400 before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess., 90 (1965).

[54] The Subcommittee Report cited the first sentence of the above quotation from Mr. Katzenbach, but he was obviously assuming from the context of Senator Foug's remark that purpose would be clear, and he went on to state the actual standard in the clear alternative.

[55] "Under our proposal he [the Attorney General] could institute a lawsuit any place in the country based on a broader statutory protection of a discriminatory *'purpose or effect'* of a particular voting law or set of voting laws. This would make it clear to the courts that it is unnecessary to prove that the intent of the local or state officials was racially motivated." 1970 Senate Hearings, *supra*, 189–90. (Emphasis added)

[56] Joint views of ten Members of the Judiciary Committee, *supra.* (Emphasis added.)

[57] *Toney* v. *White*, 488 F.2d 310 (5th Cir. 1973) *(en banc)*.

[58] *Amicus* brief of the United States *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), *prob. juris. noted sub nom. Rogers* v. *Lodge*, —— U.S. ——, 102 S. Ct. 86 (1981). Interestingly, the Department of Justice maintained this position in *Lodge*, notwithstanding the contrary view adopted by four justices in Bolden months earlier.

In 1965 there simply was no need for Congress to choose between those two aspects of Section 2. It was possible in 1965 to regard Section 2 *both* as a restatement of the Fifteenth Amendment, *and also* as reaching discrimination whether or not intent could be established The reason is that there was no general understanding in 1965 among scholars, practioners, or the lower courts that the Fourteenth and Fifteenth Amendments, themselves, always required proof of discriminatory intent to establish a violation.[59]

Depending on the circumstances and the evidence of the particular case alleging a violation of those Amendments, the Supreme Court focused its analysis sometimes on a discriminatory purposes;[60] sometimes on a discriminatory results;[61] and sometimes on both.[62]

C. The Law Prior to the Mobile Decision

An examination of the vote dilution cases before *Bolden* reveals that *Bolden* was in fact a marked departure from prior law.

The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds* v. *Sims*. The Supreme Court based its ruling on the fundamental view that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[63]

In defining the basic dilution principle, the Supreme Court observed:

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted.[64]

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[59] Prior to the passage of the Act, the Supreme Court had indicated that a finding on unconstitutional vote dilution could rest upon proof of either purpose or discriminatory results. *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), and that position was reaffirmed the following year. *Burns* v. *Richardson*, 384 U.S. 73 (1966) (See discussion of these cases at pp. 46–47 *infra*.) In *Palmer* v. *Thompson*, 403 U.S. 219 (1971), the Court held that proof of discriminatory intent was not determinative of whether there was a violation of Equal Protection and that the relevant focus was the practice's actual impact. The *Palmer* opinion also cited the 1960 Fifteenth Amendment case, *Gomillion* v. *Lightfoot*, 364 U.S. 339 and other earlier decisions and rejected the contention that they were precedent for reading an intent test in the Constitution. "[T]he focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." 403 U.S. at 225. In this same period, the Court had similarly rejected the relevance of intent in comparable challenges to official action under the First Amendment. *United States* v. *O'Brien*, 391 U.S. 367 (1968).

[60] E.g., *Wright* v. *Rockefeller*, 376 U.S. 52 (1964). There plaintiffs *had only alleged a discriminatory purpose* in attacking a reapportionment. Based on the sole issue before it, the Court ruled against the plaintiffs, but in the opinion did not suggest that only purposeful discrimination was constitutionally cognizable.

[61] *Palmer, supra; Fortson, supra.*

[62] See generally, J. Ely, "Legislative and Administrative Motivation in Constitutional Law." 79 Yale L.J. (1970). (In Ely's view, the Supreme Court's confusion about the possible role of the legislative motive in the previous few terms had reached "disaster proportions.") P. Brest, "Palmer v. Thompson, An approach to the Problem of Unconstitutional Legislative Motive." 1971 Sup. Ct. Rev. 95. This state of the law was reflected in the Supreme Court's analysis of the Voting Rights Act, itself, in 1966. *South Carolina* v. *Katzenbach* discussed the power of Congress to reach beyond the direct prohibitions of the Constitution. The Court only discussed this power in the context of upholding the literacy test suspension despite its earlier decision in *Lassiter* v. *Northhampton*, and *did not feel compelled to do so in upholding the Constitutionality of Section 5 preclearance.* Yet since Section 5 undisputably reaches changes in the law which may only have a discriminatory effect, reference to Congress' enforcement power to go beyond the Amendments themselves would seem to have been necessary if there had been a clearly understood intent requirement for the Fifteenth Amendment in 1965.

[63] 377 U.S. 533, 562 (1964).

[64] Id. at 555, n. 29.

Reynolds involved dilution of votes as a result of population disparities among legislative districts, but six months later the Supreme Court recognized that population differences were not the only way in which a facially neutral districting plan might unconstitutionally undervalue the votes of some and overvalue the votes of others. In *Fortson* v. *Dorsey*, the Supreme Court held that the use of multi-member districts was not unconstitutional *per se*, but warned:

> It might well be that, *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, *would operate to* minimize or cancel out the voting strength of racial or political elements of the voting population.[65]

The next year in *Burns* v. *Richardson*, 384 U.S. 73 (1966) the Court made it even clearer that plaintiff could prevail by proving an "invidious result." As it had in *Fortson*, the Court indicated that apportionment schemes which includes multi-member districts constitute invidious discrimination if it can be shown that:

> *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, *would operate* to minimize or cancel out the voting strength of racial or political elements of voting population.[66]

The Court then explained that the standard was whether the evidence showed "that the multi-member districting *was designed to have or had* the invidious effect necessary to a judgment of the unconstitutionality of the districting".[67]

The Court directly considered a racial dilution challenge in *Whitcomb* v. *Chavis*, rejecting a claim that a state legislative reapportionment plan operated "to minimize or cancel out" minority voting strength.[68] Black voters of Indianapolis, Indiana, challenged the plan for at-large election of eight state senators and 15 assembly members from a countywide multimember legislative district. The District Court sustained the plaintiff's contention that their voting strength was unconstitutionally diluted, on the basis of proof that black ghetto residents with district legislative interests had been consistently underrepresented in the legislature in comparison with their proportion of the population.

The Supreme Court reversed, holding that the mere fact that ghetto residents were not proportionately represented does not prove a constitutional violation unless they were denied equal access to the political process

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination, *absent evidence and findings that ghetto residents had less opportunity than did other residents to participate in the political processes and to elect legislators of their choice.*[69]

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[65] 379 U.S. at 439 (emphasis added).
[66] 384 U.S. 73, 88 (1966) (emphasis added).
[67] A legislature's proposed remedy for malapportioned Districts could only be rejected if it "was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population" (id. at 89) (emhasis added).
[68] 403 U.S. 124 (1971).
[69] *Id.* at 149 (emphasis added).

The evidence showed that the ghetto area voted Democratic, that the Republicans won four of the five elections from 1960 to 1968, and that in 1964, when the Democrats won, ghetto area senators and representatives were elected. Nine blacks had in fact been elected to the legislature from the at-large districts between 1968 and 1968. Thus, the majority concluded:

> The failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out," as the District Court held, but this seems a mere euphemism for political defeat at the polls.[70]

In *Whitcomb*, plaintiffs conceded that there was no evidence of discriminatory intent.[71] If intent had been required to prove a violation the opinion would have ended after it acknowledged plaintiffs' concession. But the Court proceeded to engage in a lengthy analysis of whether the challenged system resulted in an unconstitutional dilution of minority voting strength. Similarly, *Abate* v. *Mundt*, decided the same day, indicated that multi-member districting plans would be struck down if they "operate to impair the voting strength of particular racial or political elements. . . ." [72]

In *White* v. *Regester*, the Supreme Court upheld a District Court decision invalidating multi-member districts in Dallas and Bexar Counties, Texas, because they "operated to dilute the voting strength of racial and ethnic minorities" and "the impact of the multi-member district on [Mexican-Americans] constituted invidious discrimination." [73] The *White* decision did not analyze the motivation of the legislators. There was no discussion of the purpose behind the challenged system, and no findings of discriminatory intent. The focus was on actual result of the legislation "[b]ased on the totality of the circumstances" [74] The Supreme Court expressly held that there was no right to proportional representation; plaintiffs' burden was to prove a denial of equal opportunity:

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. *The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.* Id. at 765–66.[75]

The Court held that plaintiffs had established voting rights denials on the basis of findings that showed—

> A "history of official racial discrimination in Texas, which, at times, touched the right of Negroes to register and vote and to participate in the democratic processes."

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[70] Id. at 153.
[71] Id. at 149.
[72] 403 U.S. 182, 184, n. 2 (1971).
[73] 412 U.S. at 767.
[74] Id. at 769.
[75] Id. 765–69 (emphasis added).

A majority vote requirement for party primaries and a "place" or post requirement limiting candidates to a specified "place" on the ballot, which were not "in themselves improper nor invidious, (but which) enhanced the opportunity for racial discrimination."

No subdistrict residency requirement for candidates, meaning that "all candidates may be selected from outside the Negro residential area."

Since Reconstruction, only two black candidates from Dallas County had been elected to the Texas House of Representatives, and these two were the only blacks ever slated by the Dallas Committee for Responsible Government, white-dominated slating group.

The Dallas County slating group did not need the support of the black community to win elections and did not exhibit good-faith concern for the needs and aspirations of the black community.

The slating group had employed "racial campaign tactics" in white precincts to defeat candidates who had the overwhelming support of the black community.

Turning to Bexar County the Court found that—

The Mexican-American community of San Antonio had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."

Mexican-Americans suffered "a cultural and language barrier that makes [their] participation in the community processes extremely difficult . . ."

A history of a discriminatory poll tax and restrictive voter registration procedures which continued to have a residual impact reflected in disproportionately low voter registration levels.

Only five Mexican-Americans had served on the Texas Legislature, and only two were from the barrio area.

The Bexar County legislative delegation in the House "was insufficiently responsive to Mexican-American interests."

The Court thus found on the basis of "the totality of the circumstances that," Mexican-Americans were "effectively removed from the political processes . . ." [76]

Thus, it is clear that, prior to *Bolden*, plaintiffs in dilution cases could prevail by showing either discriminatory results *or* intent; specifically, in neither the *Whitcomb* nor the *White* decision did the Supreme Court undertake a factual examination of the intent motivating those who designed the electoral districts at issue. In fact, *White* does not contain a single word regarding the motives of the State Legislature Redistricting Board that adopted the challenged plans. As Circuit Judge John Minor Wisdom, a 25-year veteran of the Federal appellate bench, correctly noted:

> In *White* v. *Regester* and *Whitcomb* v. *Chavis*, the leading cases involving multi-member districts, the Supreme Court did not require proof of a legislative intent to discriminate.[77]

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[76] Id. at 766–69.

[77] *Nevett* v. *Sides* 571 F2d 209, 232 (5th Cir. 1978) (concurring).

Moreover, *Whitcomb* and *White* both recognized that, in order to prevail, plaintiffs had to prove more than that minority members had not elected legislators in proportion to their percentage of the population.

In approximately two dozen reported decisions prior to the *Bolden* litigation federal courts, particularly the Fifth Circuit Court of Appeals, have adhered to *White* and *Whitcomb* in deciding voting dilution cases.

First, prior to 1978, the lower courts applied a results test and did not require a showing of discriminatory intent in voting dilution cases.[78] The seminal court of appeals decision was *Zimmer* v. *McKeithen*.[79] In *Zimmer*, the Fifth Circuit, *en banc* made clear that dilution cases could be maintained on either an intent or a results basis. The plaintiff's burden was to show:

> either, first a racially motivated gerrymander or a plan drawn along racial lines, *or second*, that "... designedly or otherwise a(n) apportionment scheme, under the circumstances of a particular case, *would operate* to minimize or cancel out the voting strength of racial or political elements of the voting population.[80]

In *Zimmer*, the court articulated the factors that the Supreme Court had used in *White* to appraise the impact of the multi-member districts. The court concluded that the fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's pronouncement in *White* v. *Regester*, *supra*, demonstrates, however, that not every one of these factors needs to be proved in order to obtain relief.[81]

Zimmer was subsequently relied upon in the vast majority of nearly two dozen reported dilution cases.[82]

Other cases also specifically followed the *White* results test.[83]

Thus, it is clear that until the Fifth Circuit in 1978 attempted to reconcile *Washington* v. *Davis* [84] with *White* and *Whitcomb*, the prevailing standard in voting dilution was the "results" test and intent was not a prerequisite.

Second, in case after case the lower federal courts followed *White* in repudiating the concept of proportional representation. Typical of the lower court treatment of this issue was the Fifth Circuit's decision in *Panior* v. *Iberville Parish School Board:* [85]

> Members of a minority group have no federal right to be represented in legislative bodies in proportion to their numbers in the general population.

Third, the lower federal courts followed the pronouncement in *White* in holding multi-member districts are not *per se* unconstitutional. Applying the results test, the courts repeatedly concluded that at-large

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[78] The nearly two dozen lower court dilution cases are analyzed in the testimony of Frank Parker, Senate hearings, February 11, 1982.

[79] 485 F. 2d 1297 (5th Cir 1973) (*en banc*) aff'd on other grounds sub. nom. *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976).

[80] Id. at 1304 (emphasis supplied).

[81] Id. at 1305.

[82] *See* Parker testimony.

[83] *See*, e.g., *Dove* v. *Moore*, 539 F2d 115 (8th Cir. 1976), where the court rejected a claim that Pine Bluff, Arkansas' at-large system of electing its city council members discriminated against minority voters.

[84] 426 U.S. 229 (1976). *See*, infra at p. 56.

[85] 536 F.2d 101, (5th Cir. 1976).

elections were not vulnerable to attack unless, in the context of the total circumstances, denies minority voters an equal chance to participate in the electoral system.[86]

The *Bolden* Case

Bolden involved a challenge to the City of Mobile's at-large system of electing its city commissioner.[87] Black residents of Mobile argued that the electrical system impermissibly diluted their voting strength in violation of the Fourteenth and Fifteenth Amendments, as well as Section 2 of the Voting Rights Act of 1965.

The district court concluded that the at-large system unconstitutionally violated plaintiffs' voting rights by "improperly restricting their access to the political process." [88] After requesting submissions from plaintiffs and defendants on the remedy issue, the court adopted a plan calling for a mayor and for a city council elected from single member districts.[89]

While *Bolden* was proceeding, the Supreme Court had decided two cases which involved allegations of racial discrimination in employment, *Washington* v. *Davis*, 426 U.S. 229 (1976); and housing *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In these two cases, the Supreme Court for the first time expressly adopted a broad rule requiring plaintiffs to prove discriminatory intent in order to establish a constitutional violation under the Fourteenth Amendment.[90]

In *Mobile* and companion litigation a year later, the Fifth Circuit tried to harmonize *White*, *Whitcomb* and its own prior vote dilution cases, with *Washington* and *Arlington Heights*.[91] The Court of Appeals reinterpreted the "results" test of *White* and *Zimmer*, and, for the first time, viewed the factors controlling in those cases as circumstantial evidence of discriminatory intent.[92]

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[86] In *Zimmer*, the Fifth Circuit stated that "[i]t is axiomatic that at-large and multi-member destricting schemes are not *per se* unconstitutional." 485 F.2d at 1304.

[87] The City of Mobile is governed by three commissioners who are elected at-large. Commission candidates are required to run for numbered posts and must win by a majority vote. While candidates must be residents of Mobile, there is no requirement that each commissioner reside in a particular part of the city. The commisisoners are elected for four-year terms and the mayoralty is shared eqully mong the commissioners during their terms.

[88] 423 F. Supp. at 399. In reaching its conclusion, the court analyzed a number of objective factors, in the context of which it found that the at-large system violated plaintiff's constitutional rights. Among the factors considered by the court were: history of past discrimination against blacks and its effect on present minority political participation, racially polarized voting, and the unresponsiveness of white elected city officials to the needs of the black minority. The court also deemed relevant that a black had never been elected as a city commissioner.

[89] At the end of trial, the court requested the parties to submit proposed plans in the event that the court found the at-large system unconstitutional. Mobile could have maintained its commission from of government if it had agreed to a plan under which all or most commissioners were chosen from single member districts. However, Mobile repeatedly refused to submit a plan providing for anything other than at-large elections. Moreover, the city indicated that if there were to be single-member district elections, it preferred to change its form of government to a mayor-council plan. The district court requested the city to nominate two members of a three member advisory committee which would propose a remedy. The committee proposed a plan based on the mayor-council form of government in force in Montgomery, an Alabama city comparable in size to Mobile. After submission of this proposal the district court invited and received comments on the plan from both counsel for the parties and other elected officials from Mobile. The court adopted the plan with some modifications based on those comments. It noted, however, that Mobile could at any time replace the court-approved plan with any other "constitutional form of government" it should ultimately decide it preferred to the plan adopted by the district court.

See *Mobile* v. *Bolden*, 446 U.S. 55 (1980, Brief for the United States as Amicus Curiae, pp. 96–99; Brief for Appellees, pp. 92–95.

[90] See P. Brest, "Forward—The Supreme Court 1975 Term: In Defense of the Anti-Discrimination Principle", 90 Harv. L. Rev. 1, 24–25 (1976).

[91] *Bolden* v. *City of Mobile*, 571 F. 2d 238 (5th Cir. 1978).

[92] 571 F. 2d at 245.

A deeply split Supreme Court reversed the lower courts.[93] Justice Stewart wrote the plurality opinion, for himself, Chief Justice Burger, Justice Powell and Justice Rehnquist.

The plurality opinion said that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.[94] The plurality also concluded that since Section 2 was designed by Congress to track the Fifteenth Amendment, it too requires proof of discriminatory intent.[95]

The plurality also concluded that the Fifteenth Amendment only bars direct interference with the right to vote and does not reach voting dilution claims.[96] Finally, the plurality found that a discriminatory intent must be shown to establish a violation of the Equal Protection clause of the Fourteenth Amendment in racial vote dilution cases. With respect to the equal protection claim, the plurality found that the circumstances deemed relevant in *White* and relied on by the lower courts were insufficient to prove an unconstitutionally distionally discriminatory purpose.[97]

Justice Stewart acknowledged the impact of the *Washington* case on the prior analysis of vote dilution cases under the *White* standard:

> The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U.S. 229, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminately purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient. See 485 F. 2d at 1304–1305, and n. 16.[98]

Justices Blackmun and Stevens concurred separately in the result reached by the plurality.[99]

Justices White, Marshall and Brennan dissented. Justice White, the author of both *White* v. *Regester* and *Washington* v. *Davis* called the plurality's opinion "flatly inconsistent" with *White* and further noted that in his view, the evidence of an inference of discriminatory intent in *Mobile* "is even more compelling than that present in *White*. . ." [100] Justice White said that the plurality had incorrectly viewed each of the *Zimmer* factors in isolation, rejecting *White's* totality of circumstances test. Justices Marshall and Brennan argued that intent was not a requisite in voting dilution cases brought under either the Fourteenth or Fifteenth Amendments,[101] but that even if it were the appellees had clearly met their burden of proof.

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[93] 446 U.S. 55.
[94] 446 U.S. at 62.
[95] *Id.* at 61.
[96] *Id.* at 65.
[97] *Id.* at 73.
[98] *Id.* at 71.
[99] Justice Blackmun concurred on the ground that the remedy imposed by the district court "was not commensurate with the sound exercise of judicial discretion." *Id.* at 80. While reserving the question of whether discriminatory purpose is a requisite, he did state that if intent were necessary, the facts found by the district court were sufficient to support an inference of discriminttory intent. Justice Stevens agreed with the plurality that no constitutional violation had been shown; but, unlike the pluarlity he orgued that the "proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker." *Id.* at 90.
[100] *Id.* at 103.
[101] *Id.* at 94, 104.

A fair reading of *Bolden* reveals that the plurality opinion was a marked departure from earlier Supreme Court and lower court vote dilution cases. As Judge Goldberg wrote in *Jones* v. *City of Lubbock*, 625 F2d, 21, 22, (1981), "the Supreme Court (in *Bolden*) completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens." [102]

In *Bolden*, the plurality abandoned the clear and workable totality of circumstances test of *White*, but in doing so it failed to articulate a substitute standard to guide federal courts in the future. As Justice White noted in his dissent in *Bolden*, the plurality's rejection of the White test, "leaves the courts below adrift on uncharted seas . . ." [103]

The impact of *Bolden* upon voting dilution litigation became apparent almost immediately after the Court's decision was handed down on April 22, 1980. As the Subcommittee heard throughout its hearings, after *Bolden* litigators virtually stopped filing new voting dilution cases. Moreover, the decision had a direct impact on voting dilution cases that were making their way through the federal judicial system.

Perhaps the most dramatic evidence of the drastic change worked by *Bolden* is the decision's impact on the Edgefield County, South Carolina case, *McCain* v. *Lybrand*. On April 17, 1980, the district court ruled the county's at-large system of electing county council members was unconstitutional. In an exhaustive opinion, the district court faithfully applied the *White* results test and concluded that blacks simply did not have a fair chance to participate in the system. "Black participation in Edgefield County has been merely tokenism and even this has been on a very small scale." [104]

Despite the overwhelming evidence of unequal access to the electoral system, the district court's determination could not withstand the impact of *Bolden*. Shortly after rendering its initial decision the district court vacated the judgment and stated:

> A careful reading of *Mobile* and a reconsideration of the evidence in the present Edgefield County case convinced the Court that the plaintiffs have not proved that the voting plan for election of members of the County Council in Edgefield County was either conceived or is operated as a purposeful device to further racial discrimination nor was it intended to individually discriminate against blacks in violaton of the Equal Protection Clause.[105]

The extent to which *Bolden* has changed the law in voting dilution cases is also illustrated by recent litigation on remand in *Bolden*, itself. On remand, following the Supreme Court's decision in *Bolden*, the district court was required to make an inquiry into the motives of legislators to determine whether the system was devised or maintained for a discriminatory purpose. The court found itself immersed in an exhaustive examination of each development in the city council election system from 1814 to the present. In order to comply with *Bolden*, the district court was forced to recreate events shedding light on the motivation of politicians who held office during the several crucial periods under investigation between 1814 and the present. An ex-

[102] 625 F.2d 21, 22 (5th Cir. 1981) (concurring).
[103] 446 U.S. at 103.
[104] Slip opinion, 18 (D.S.C. No. 74–281, April 17, 1980).
[105] Order of August 11, 1980.

haustive search of local newspaper files and other records revealed a number of racially inflammatory statements by the sponsors of some of the predecessor laws in question from the beginning of this century. The court found that those smoking guns "lead unerringly" to the conclusion that the [advocates of those laws]/desired and intended the result." [106]

D. The Operation of Amended Section 2

With the benefit of the record of explanation and analysis of the Section 2 amendment by its Congressional sponsors and witnesses in the House of Representatives,[107] and the even more detailed, almost exhaustive, inquiry by our Subcommittee on the Constitution, the Committee has had an opportunity to examine all the aspects of the issues and implications raised by the new language. Based on this examination, the Committee believes that the amendment is sound, that it is necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights, and that it will not present the dangers raised by those who have opposed it—a requirement of racial quotas, or an all-out assault on at-large election systems in general.

The Committee decided that it would be useful to spell out more specifically in the statute the standard that the proposed amendment is intended to codify. To this end, the Committee adopted substitute language that is faithful to the basic intent of the Section 2 amendment adopted by the House and included in S. 1992, as introduced by Senators Mathias and Kennedy and sponsored by 63 other Senators.

The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent,[108] or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

The "results" standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote. Specifically, subsection (b) embodies the test laid down by the Supreme Court in *White*.[109]

If the plaintiff proceeds under the "results test", then the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance.

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[106] *Bolden* (slip opinion) 34 (April 15, 1982) (on remand)).

[107] Notwithstanding statements made at the Senate hearings that only three witnesses addressed the Section 2 issue during the House hearings, some 30 witnesses discussed the need for, or the meaning of, the Section 2 amendment during the House proceedings.

[108] Plaintiff may establish discriminatory intent for purposes of this section, through direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions which "is one type of quite relevant evidence of racially discriminatory purpose." *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 536, n. 9 (1979). Also see testimony of Irving Younger, Senate Hearings, at p. 5. *Village of Arlington Heights* v. *Metropolitan Housing Develop. Corp.* 429 U.S. 252, 264–68 (1977).

[109] During the Committee deliberations, opponents of the results test argued that the reported bill is inconsistent with the results standard because Section 2, as amended, still contains the phrase "a denial or abridgement [of the right to vote] on account of race or color." The argument is that the words "on account of" themselves create a requirement of purposeful discrimination. This claim overlooks the present structure of the Voting Rights Act, which completely refutes it. Section 5 of the present Act requires the Attorney

footnote continued on p. 28.

As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, just as much as outright denial of access to the ballot box.[110]

In adopting the "result standard" as articulated in *White* v. *Regester*, the Committee has codified the basic principle in that case as it was applied prior to the *Mobile* litigation.

The Committee has concluded that *White*, and the decisions following it made no finding and required no proof as to the motivation or purpose behind the practice or structure in question.[111] Regardless of differing interpretations of *White* and *Whitcomb*, however, and despite the plurality opinion in *Mobile* that the *White* involves an "ultimate" requirement of proving discriminatory purpose, the specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose.[112]

Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy.

If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.

Typical factors include:[113]

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

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footnote [109] continued.

General or the district court to disapprove a proposed voting law change unless the submitting jurisdiction establishes that it "does not have the purpose *and will not have the effect* of denying or abridging the right to vote *on account of race or color* . . . ." (Emphasis disprove discriminatory purpose and the burden to disapprove discriminatory impact. The same use of "on account of race or color" is made in a different context in Section 4(a). Thus it is patently clearly that Congress has used the words "on account of race or color" in the Act to mean "with respect to" race or color, and not to connote any required purpose of racial discrimination. Any other arguments based on similar parsing of isolated words in the bill that there is some implied "purpose" component in Section 2, even when plaintiffs proceed under the results standard, are equally misplaced and incorrect.

[110] *Fortson* v. *Dorsey*; *Burns* v. *Richardson*.

[111] A study of the opinion in *White* reveals no discussion of evidence or analysis by the court as to the motivation behind the challenged practice, nor any suggestion that such a finding was essential to relief "Mr. Justice White's opinion assigned plaintiffs a heavy burden, but not one requiring proof of discriminatory intent." P. Brest, "The Supreme Court—Forward, In Defense of the Antidiscrimination Principle,' 90 Harv. L. Rev. 1, 44 (1976).

The Committee does not adopt any view of *White* as requiring plaintiff to meet some "objective design" test that is, in effect, a version of the "foreseeable consequences" test of tort law. Although *White* refers to the "design" of the multimember districts, the context makes clear that this refers to their particular format, and has no connotation of purpose. Thus, Brest observes: "The Court did not imply that the multimember districts had been discriminatorily designed." Id. (Emphasis added.)

[112] The Fifth Circuit, when it affirmed *Bolden* in 1978, held that the *White-Zimmer* factors allowed the district court to infer discriminatory purpose. Under the Committee bill that step is unnecessary: a finding of the appropriate factors showing current dilution is sufficient, without any need to decide whether those findings, by themselves, or with additional circumstantial evidence, also would warrant an inference of discriminatory purpose.

[113] These factors are derived from the analytical framework used by the Supreme Court in *White*, as articulated in *Zimmer*.

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; [114]

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[115]

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.[116]

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[117]

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.[118]

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[114] The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation, e.g., *White* 412 U.S. at 768; *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 145. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

[115] The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote", in violation of this section. *Zimmer* 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . Instead we shall continue to require an independent consideration of the record." *Ibid.*

[116] Unresponsiveness is not an essential part of plaintiff's case. *Zimmer; White* (as to Dallas.) Therefore, defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process. The amendment rejects the ruling in *Lodge* v. *Buxton* and companion cases that unresponsiveness is a requisite element, 639 F.2d 1358, 1375 (5th Cir. 1981), (an approach apparently taken in order to comply with the intent requirement which the Supreme Court's plurality opinion in *Bolden* imposed on the former language of Section 2.) However, should plaintiff choose to offer evidence of unresponsiveness, then the defendant could offer rebuttal evidence of its responsiveness.

[117] If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

[118] The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, "minimized or canceled out."

Whitcomb, *White*, *Zimmer*, and their progeny dealt with electoral system features such as at-large elections, majority vote requirements and districting plans. However, Section 2 remains the major statutory prohibition of all voting rights discrimination. It also prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members.

If the challenged practice relates to such a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers. Of course, the ultimate test would be the White standard codified by this amendment of Section 2: whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.[119]

The requirement that the political processes leading to nomination and election ' 'equally open to participation by the group in question" extends beyond formal or official bars to registering and voting, or to maintaining a candidacy.

As the Court said in *White*, the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality." [120]

Finally, the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. See *Allen* v. *Board of Elections*, 393 U.S. 544 1969).

DISCLAIMER

When a federal judge is called upon to determine the validity of a practice challenged under Section 2, as amended, he or she is required to act in full accordance with the disclaimer in Section 2 which reads as follows:

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Contrary to assertions made during the full Committee mark-up of the legislation, this provision is both clear and straightforward.

[119] This aspect of the statute's scope is illustrated by a variety of Section 2 cases involving such episodic discrimination. For example, a violation could be proved by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens. See *Brown* v. *Post*, 279 F. Supp. 60, 63–64 (W.D.La. 1968). Likewise, purging of voters could produce a discriminatory result if fair procedures were not followed, *Toney* v. *White*, 488 F.2d 310 (5th Cir. 1973), or if the need for a purge were not shown or if opportunities for re-registration were unduly limited. Administration of an election could likewise have a discriminatory result if, for example, the information provided to voters substantially misled them in a discriminatory way. *United States* v. *Post*, 297 F. Supp. 46, 50–51 (W. D. La. 1969).

[120] 412 U.S. at 769–770. Therefore, for purposes of Section 2, the conclusion in the *Mobile* plurality opinion that "there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance", would not be dispositive. Section 2, as amended, adopts the functional view of "political process", used in *White* rather than the formalistic view espoused by the plurality in *Mobile*. Likewise, although the plurality suggested that the Fifteenth Amendment may be limited to the right to cast a ballot and may not extend to claims of voting dilution (without explaining how, in that case, one's vote could be "abridged"), this section without question is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote.

This disclaimer is entirely consistent with the above mentioned Supreme Court and Court of Appeals precedents, which contain similar statements regarding the absence of any right to proportional representation. It puts to rest any concerns that have been voiced about racial quotas.

The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.[121]

The proposed results test was developed by the Supreme Court and followed in nearly two dozen cases by the lower federal courts. The results test is well-known to federal judges. It is not an easy test. As Arthur Flemming told the Subcommittee on the Constitution, "*White* v. *Regester* sets realistic standards for analyzing voting dilution cases." [122] It was only after the adoption of the results test and its application by the lower federal courts that minority voters in many jurisdictions finally began to emerge from virtual exclusion from the electoral process. We are acting to restore the opportunity for further progress.

E. Responses to Questions Raised About the Results Test

Opponents of the "results test" codified by the Committee have made numerous allegations as to the potential dangers of its adoption. At bottom, all of these allegations proceed from two assumptions, both of which are demonstrably incorrect.

First, these allegations assume that the "results test" is a radically new and untested standard for voting discrimination suits, with unknown contours and unforeseeable consequences. Opponents nonetheless are somehow confident enough of the implications of this allegedly new standard to predict that it will:

> inevitably lead to a requirement of proportional representation for minority groups on elected bodies;
>
> make thousands of at-large election systems across the country either *per se illegal* or vulnerable on the basis of the slightest evidence of underepresentation of minorities; and
>
> be a divisive factor in local communities by emphasizing the role of racial politics.

They specifically list a number of states and cities whose election systems they allege would be vulnerable under the Committee bill.

The second assumption, equally incorrect, is that the only way to safeguard against these dangers is to make proof of discriminatory intent an essential element of establishing violations of Section 2.

The testimony and other evidence presented to the Committee belie both assumptions. The proof lies in the fact that numerous courts

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[121] *Louisiana* v. *U.S.*, 380 U.S. 145 (1965); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Green* v. *County School Board*, 391 U.S. 430 (1968); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *In Re*: *Illinois Congressional Reapportionment*, File No. 81-C-3915 (1981), aff'd sub nom. *Ryan* v. *Otto*, 102 S. Ct. 985 (1982).

[122] Senate hearings, Statement of Arthur Flemming, February 11, 1982, p. 2.

followed and applied the same "results test," without requiring any proof of intent, and none of these predicted dire consequences occurred. There is, in short, an extensive, reliable and reassuring track record of court decisions using the very standard which the Committtee bill would codify. The witnesses who attacked the "result standard" virtually ignored those decisions in their analysis and, in most cases, admitted unfamiliarity with them, as well.

Moreover, any possible statutory ambiguity as to whether the results standard of the revised language in Section 2 would trigger this substantial body of preexisting case law has been eliminated by the Committee's adoption of the substitute amendment. As noted in the previous section, the substitute amendment codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and extensive case law which developed around it, into the application of Section 2.

What has been the judicial track record under the "results test"? That record received intense scrutiny during the Committee hearings. The Committee reviewed not only the Supreme Court decisions in *Whitecomb* and *White*, but also some 23 reported vote dilution cases in which federal courts of appeals, prior to 1978, followed *White*. Nineteen of those cases arose in the Fifth Circuit, which during that period, covered most of the South from Georgia to Texas, and thus was the center of the vast majority of vote dilution litigation.

These 23 cases represent the actual judicial understanding and application of the *White* standard codified in the Committee bill. The Committee's review of these cases established the following major points:

1. The results test of *White* was the controlling standard applied in all of these cases. In most of them, the court followed the articulation of the *White* holding provided by the Fifth Circuit in *Zimmer*, which was decided the same year. In each case the courts looked to determine whether, in the words of both *White* and the present Committee amendment of Section 2, the "political processes" were "equally open" and whether the members of the minority group had the same "opportunity" as others in the electorate to "participate in the political processes and to elect representatives of their choice."

2. These cases did not apply an "intent standard." Justice Stewart's plurality opinion in *Bolden* explicitly acknowledges that *Zimmer* (and by implication all of the cases which followed it) *proceeded on the assumption that proof of intent was not required.*[123] In addition, the Committee heard expert testimony from half a dozen litigators who were actively involved in vote dilution litigation during this period and specifically were counsel in most of the cited cases. The unanimous and uncontradicted testimony of those witnesses was that the parties and the courts did not focus on the motives behind the election methods being challenged, let alone require proof of discriminatory intent as a prerequisite to relief.[124]

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[123] See p. 58 *supra*.

[124] Some opponents of the Committee bill have tried to turn these first two points upside down. They do not argue that the cases which constitute the track record were wrongly decided or that they produced the consequenes whih are feared. Instead, they argue that because those cases did not insist on proportional representation or invariably strike down at-large elections, it follows that they must have been "intent cases." Yet even using this faulty logic, they are unable to point to a single facet of the *White* opinion which inquired into the purpose of any official or elective body that had anything to do with designing or maintaining the multi-member districts in question.

3. Under the results test, the cases never required proportional representation, and invariably repudiated it. This conclusion has not been challenged by any of the testimony. This rejection of proportional representation as the standard for legality under the results test is explicitly incorporated into the statute by the disclaimer, based on the holding in *White*. The disclaimer squarely states that the Section creates no right to proportional representation for any group.

4. Under the results test, at large elections were not automatically invalidated. In fact, in its articulation of the results test, in *Zimmer* the Fifth Circuit explicitly stated, "it is axiomatic that at large and multi-member districting schemes are not *per se* unconstitutional." [125]

Multi-member districts were upheld by the Supreme Court in *Whitcomb* under the same test used to strike them down—in the context of a different totality of circumstances—in *White*. Sixteen of the subsequent courts of appeals cases involved challenges to at-large elections, and the defendants prevailed in 10 of those decisions which permitted the continued use of the at-large elections. These included cases from Circuits other than the Fifth Circuit.[126]

5. The results test did not assure victory for plaintiffs. Of the total 23 cases, defendants won 13 and prevailed in part in two others. In response to this unchallengeable statistic, some have suggested that plaintiffs could win under the results test by merely showing (a) at-large elections; (b) underrepresentation of minorities; and (c) "a scintilla" of evidence, i.e., proof of one additional factor from among which *Zimmer* lists as relevant.

The cases analyzed show that this position is simply wrong.

On a number of occasions, plaintiffs who had proven one or two or three of the *Zimmer* factors—certainly more than a "scintilla"—were found to fall short of the showing required to render an electoral scheme void under the results test.[127]

6. Under the results test, the court distinguished between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not.

The Subcommittee Report claims that the results test *assumes* "that race is the predominant determinant of political preference." The Subcommittee Report notes that in many cases racial bloc voting is not so monolithic, and that minority voters do receive substantial support from white voters.[128]

That statement is correct, but misses the point. It is true with respect to most communities, and in those communities it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.

Unfortunately, however, there still are some communities in our Nation where racial politics do dominate the electoral process.

In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections.

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[125] 485 F 2d at 1304.

[126] *Black Voters* v. *McDonough*, 565 F. 2d 1 (1st Cir. 1977); *Dove* v. *Moore*, 539 F. 2d 1152 (8th Cir. 1976).

[127] *E.g. Hendrix* v. *Joseph*, 559 F. 2d 1265 (5th Cir.) cert. denied 434, 970 (1977); F. 2d 1109 (5th Cir.) (1975).

[128] Subcommittee Report, pp. 41–44.

To suggest that it is the results test, carefully applied by the courts, which is responsible for those instances of intensive racial politics, is like saying that it is the doctor's thermometer which causes high fever.

The results test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

Proponents of the "intent standard" however, do presume that such racial politics no longer affect minority voters in America. This presumption ignores a regrettable reality established by overwhelming evidence at the Senate and House hearings.

These conclusions, based on a careful review of the existing track record under the "results test" in the Committee amendment have convinced us that the questions raised by some about that test are satisfactorily answered by that record.

Allegation that Certain Cities Are Vulnerable Under the Results Test

During the hearings, Assistant Attorney General William Bradford Reynolds provided the Committee with a list of cities which, in his opinion, would be vulnerable to attack under the results standard of the amended Section 2. Similarly, the Subcommitte Report provided a list of cities where, according to the report, a "court ordered restructuring" of electoral systems would be the "likely" outcome under the results test.[129] The Committee has examined these assertions and has found that the facts upon which they are based, without more, would clearly be insufficient to support a finding of violation under the amended Section 2. Specifically, the Committee finds that the analysis used by the Assistant Attorney General and the Subcommittee were inconsistent with how the results test in fact operates, and ignored the track record of cases decided under the results test discussed above.

Briefly, the primary basis for the Assistant Attorney General's listing of cities was simply the lack of proportional representation, plus the existence of an at-large or multi-member district election system. Similarly, the Subcommittee's list was based primarily on the same two criteria, plus the addition of one other "factor," usually the existence of previously *de jure* segregated schools. As has already been discussed, this simply was not the approach used by the courts under the *White/Zimmer* test.

This Report has already cited several cases where plaintiffs lost, despite the conjunction of at-large systems and underrepresentation, and the presence of many more factors than those relied upon by Assistant Attorney General Reynolds or the Subcommittee Report. If the mere existence of underrepresentation plus a history of dual schools had been sufficient under *White*, then plaintiffs would have won in every lawsuit brought in the Fifth Circuit, which was clearly not the case. Moreover, the courts did not use a mechanical "factor counting" approach, as did the Assistant Attorney General and the Subcommittee. Rather the factors were considered as part of the total circum-

[129] Subcommitteee Report, pp. 46–52.

stances and in light of the ultimate issue to be decided, i.e., whether the political processes were equally open.

The inaccuracies of both of these lists of allegedly vulnerable jurisdictions are also revealed by a study conducted by the Department of Justice in 1978. This study analyzed more than 200 cities throughout 40 northern and western states to see whether vote dilution cases should be brought in those regions. The standard used by the Department to evaluate the liability of those jurisdictions was the *White* "results" test which the amended Section 2 would restore. The initial review of most of these cities revealed an insufficient basis for proceeding further. A few were selected for more detailed investigations. Yet, these cities, too, were ultimately found by the department not to warrant litigation.

The Committee notes that this 1978 study covered 20 of the same 25 cities cited by the Assistant Attorney General. One city that he mentioned, Cincinnati, is particularly illustrative. Cincinnati was the subject of one of the most detailed investigations of the entire study. The report of the study squarely stated:

> In lke manner, Cincinnati, Ohio, was the subject of a vote dilution investigation by the Civil Rights Division but once again, the Division did not discover the facts necessary to institute a lawsuit under the *White* v. *Regester* standard.[130]

The 1978 Justice Department investigation also encompassed over half of the cities mentioned in the Subcommittee Report, and two of the cities cited by the Subcommittee were the subject of the more detailed Justice investigations. Cincinnati and Waterbury, Connecticut, where, again, no potential dilution case under the results standard was found. The Justice Department's own records also showed the inaccuracy of the Subcommittee's listing of still another city, Savannah, Georgia. That city had completed an annexation in 1978, a voting change which was submitted to the Department of Justice for preclearance under Section 5. After subjecting the proposed annexation to the rigorous requirements of Section 5, the Department decided that the annexation was not objectionable because the election system provides black voters with adequate opportunity for participation and fair representation.

The Committee has been well aware of the great importance of this issue and accordingly has examined it at great length. However, it concludes as did the House Judiciary Committee, that the amendment to Section 2 is careful, sound, and necessary, and will not result in wholesale invalidation of electoral structures.

Results Test Supported By Affected Jurisdictions

Members of the Committee also received communications from representatives of the States and political subdivision which the "results test" ultimately would affect. The Conference of State Legislatures, the Conference of Mayors, and the League of Cities all have endorsed the "results" test in the Committee bill as preferable to requiring proof of a discriminatory intent in order to establish a violation of Section 2 of the Act.[131]

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[130] Letter from Assistant Attorney General McConnell to Rep. Henry Hyde, July 9, 1981, at 1.

[131] "In particular, we urge no change in Section 2 of S. 1992 as introduced which reinstates the 'results' test as the basis for determining whether a jurisdiction is discriminat-

F. The Limitations Of The Intent Test

The intent test is inappropriate as the exclusive standard for establishing a violation of Section 2. This is so for several reasons. During the hearings, there was considerable discussion of the difficulty often encountered in meeting the intent test, but that is not the principal reason why we have rejected it.

The main reason is that, simply put, the test asks the wrong question. In the *Bolden* case on remand, the district court after a tremendous expenditure of resources by the parties and the court, concluded that officials had acted more than 100 years ago for discriminatory motives. However, if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance. The standard under the Committee amendment is whether minorities have equal access to the process of electing their representatives. If they are denied a fair opportunity to participate, the Committee believes that the system should be changed, regardless of what may or may not be provable about events which took place decades ago.

Second, the Committee has heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities. As Dr. Arthur S. Flemming, Chairman of the United States Commission on Civil Rights, testified during hearings before the Subcommittee on the Constitution:

> (L)itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.[132]

The very concern voiced by Dr. Flemming was illustrated by two recent decisions, *Bolden*, on remand, and *Perkins* v. *City of West Helena*.[133] In both cases, the federal courts were compelled to label the motives of recent public officials as "racial" in reaching the conclusion that an electoral system was maintained for a discriminatory purpose.

Third, the intent test will be an inordinately difficult burden for plaintiffs in most cases. In the case of laws enacted many decades ago, the legislators cannot be subpoenaed from their graves for testimony about the motives behind their actions. Further, whatever the uneven extent of legislative records for State legislative sessions of 50 or 100 years ago, it is clear that most counties and smaller cities will not have

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ing against minorities." Letter from John J. Gunther, Executive Director, United States Conference of Mayors, to Committee members, March 24, 1982.

"The National Conference of State Legislatures policy resolution on the Voting Rights Act states that 'discriminatory results are more accurate indicators of discriminatory voting practices than proof of intent . . . '" Letter from David Nething, Chairman, State-Federal Assembly, National Conference of State Legislatures, Jan. 26, 1981.

"We believe that restoration of the pre-Bolden test which allowed proof of discriminatory effects as well as intent, is necessary to provide all victims of voting discrimination with a remedy under Section 2." Alan Beals, Executive Director, National League of Cities, April 26, 1982 letter to Committee.

[132] Flemming statement, pp. 6–7.

[133] *Perkins* v. *City of West Helena, Ark.* No. 81–1516 (8th cir. 1982).

available the kind of official records and newspaper files which the plaintiffs were able to procure for the retrial of *Mobile*.

In the case of more recent enactments, the courts may rule that plaintiffs face barriers of "legislative immunity," both as to the motives involved in the legislative process [134] and as to the motives of the majority electorate when an election law has been adopted or maintained as the result of a referendum.[135]

Moreover, recent enactments, and future ones, are those most likely to pose the fundamental defect of relying exclusively on an intent standard, namely, the defendant's abiilty to offer a non-racial rationalization for a law which in fact purposely discriminates.

This defect cannot be cured completely even though plaintiffs are allowed to establish discriminatory intent by use of a wide variety of circumstantial and indirect evidence, including proof of the same factors used to establish a discriminatory result.[136] The inherent danger in exclusive reliance on proof of motivation lies not only in the difficulties of plaintiff establishing a prima facie case of discrimination, but also in the fact that the defendants can attempt to rebut that circumstantial evidence by planting a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives. So long as the court must make a separate ultimate finding of intent, after accepting the proof of the factors involved in the *White* analysis, that danger remains and seriously clouds the prospects of eradicating the remaining instances of racial discrimination in American elections.

Post-*Bolden* Cases

During the hearings, proponents of the intent requirement claimed that several cases decided subsequent to the Supreme Court's *Bolden* decision demonstrate that the intent test is not too difficult a standard for plaintiffs to meet in vote dilution cases. It is true that plaintiffs have prevailed in a few cases since *Bolden*; but a careful analysis of all the post-*Bolden* decisions confirms its decidedly negative impact on the ability of minority voters to end discrimination.

Minority voters lost some cases despite egregious factual situations. Even when plaintiffs have prevailed, the intent test has imposed on federal courts its requirement of protracted, burdensome inquiries into the racial motives of lawmakers—rather than examining the present ability of minority voters to participate equally in their political system.

McMillan v. *Escambia County*,[137] in which plantiffs prevailed in part was frequently cited by opponents of the "results" test. *Escambia* involved the at-large systems of electing county commissioners, city councilmen, and school board members in Pensacola and Escambia County, Florida. The Fifth Circuit sustained the judgment for plaintiffs with respect to the school board and city council, but not as to

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[134] *Arlington Heights* v. *Metropolitan H.D. Corp.*, supra at 268.
[135] *Kirksey* v. *City of Jackson*, F.2d (5th cir. 1982).
[136] See, e.g. testimony of Archibald Cox, p. 66; but, c.f., *Mobile* where the plurality appeared to severely curtail the use of circumstantial and indirect evidence to prove intent. It is the Committee's intent that plaintiffs be able to rely on such evidence in proving violations of Section 2 where they choose to proceed under the "intent" standard, instead of the results standard codified in the revised Section 2, infra p. f.n.
[137] 638 F. 2d 1239 (5th Cir. 1981).

the at-large system of electing county commissioners. However, even a casual reading of *Escambia* reveals that it was one of those rare instances where the court found a "smoking gun" to satisfy the heavy burden imposed by *Bolden*.[138]

Also cited was the Burke County, Georgia case, *Lodge* v. *Buxton*.[139] That plaintiffs prevailed in both the district court and Fifth Circuit in *Lodge* should surprise no one. The evidence was so overwhelming that the plaintiffs' victory was to be expected regardless of whether one applied a "results" or "Bolden-intent" analysis. The district court concluded that every one of the relevant factors considered in *White* and *Zimmer* was proven by plaintiffs—a virtually unprecedented result according to an experienced voting rights attorney. [140] The Fifth Circuit noted that the case presented an extreme situation:

> The picture plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County.[141]

Two other cases decided after the completion of the Subcommittee hearings have also been cited by proponents of the intent test. In the Committee's view, however, neither of these cases is inconsistent with our overall conclusion that the intent test places an unacceptable burden on plaintiffs and diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process. The first case involves West Helena, Arkansas.[142] The second post-hearings case is the previously discussed decision in *Bolden* itself. Equally instructive are the cases which plaintiffs have lost since *Bolden*. Reference has been made above to perhaps the most dramatic judicial response to *Bolden*—the Edgefield County case, *McCain* v. *Lybrand*.

Also, at-large school board elections were upheld in Gadsden County, Florida,[143] although they were based on the very same state

[138] In 1931 Pensacola had adopted a mixed at-large and single member system for the city council. The court received testimony that after a black was narrowly defeated for one of the single member seats, the council purposefully gerrymandered the ward in the next reapportionment to insure a white victory. In 1959, the city adopted a completely at-large system. According to the trial testimony on discriminatory purpose, the change was made to eliminate "this hassle to reapportioning to keep so many blacks in this ward and so many whites in that ward and keep the population in balance as to race." 638 F. 2d at 1247. Former Florida Governor Reuben Askew, who had been a state representative at the time, also testified that one of the council members had indicated "the change was wanted to avoid a 'salt and pepper council'." *Id.* As for the school board, from 1907 to 1945 primary elections were conducted on a single member basis, while the general elections were at-large. The all-white Democratic primary was tantamount to election. Following the outlawing of white primaries in 1945, the state legislature required at-large elections in both the primary and general election. The Court of Appeals found that: "The specific sequence of events leading up to the decision (to change to at-large elections) mandates the conclusion that the citizens of Escambia County in 1945, with the demise of the white primary, were not going to take any chances on blacks gaining power and thus purposefully sought to dilute black voting strength through the use of an at-large system." *Id.* at 1245. Such direct testimony or transparent chain of events is not usually available for a plaintiff's case.

[139] 639 F. 2d 1358 (5th Cr. 1981).

[140] *See* testimony of Laughlin MacDonald at 115, January 28, 1982.

[141] 639 F. 2d at 1381.

[142] *Perkins*, involved in a challenge to West Helena's at-large election of its aldermen. The Eighth Circuit reversed the district court's determination that the system had not been maintained for a discriminatory purpose. However, while ruling for plaintiffs, the Eighth Circuit nonetheless recognized the confusion caused by *Bolden*, stating that "(t)he precise nature and extent of the evidence necessary to establish discriminatory intent is, however, fraught with ambiguity after *Bolden*." Slip opinion at p. 13. Significantly, in reaching its conclusion that the system was maintained for a discriminatory purpose, the Eighth Circuit had the benefit of a "smoking gun" in the "explicit statements of the officials who are directly responsible for maintaining West Helena's at-large voting system and who have rejected requests to change the voting plan to eletions by ward." *Id.* at 29–30. "Such direct evidence of invidious intent, so rarely available, must be given great weight in answering the question of whether a defendant acted with a discriminatory purpose." *Id.* at 34–35 (emphasis added).

[143] *Campbell* v. *Gadsden County School Board*, TCA 78–177 (N.D. Fla. 1981).

law that was held to be purposely discriminatory several counties to the west in Escambia.

In *Cross* v. *Baxter*, a challenge to elections in Moultrie, Georgia, was rejected, even though the evidence showed pervasive discrimination in the political process.[144]

Two cases with strong evidence of present-day discrimination were lost because district courts held that the adoption of challenged practices in the early years of this century could not have been racially motivated since blacks were already shut out of electoral politics by other methods.[145] This result clashes with the analysis by the District Court in the *Bolden* case on remand which revealed that a renewal of black political power remained a legislative concern even during that period.[146] In Alabama, a district court dismissed an attempt by the United States to introduce the very kind of testimony called for by *Mobile*—"historical evidence going to the reasons for the adoption of at-large elections"—on the ground that without evidence of unresponsiveness, proof of discriminatory purpose was useless.[147]

Finally, the Justice Department has dismissed two cases it had filed on the basis of the results standard, after concluding the proof of discrimination in the system would not meet the intent test.[148]

In summary, a full review of the cases following the *Bolden* decision provides little support for exclusive reliance on the intent test.

G. Constitutionality of Amendment to Section 2

The proposed amendment modifying a results test to Section 2 is a clearly constitutional exercise of Congressional power under Article I and the Fourteenth and Fifteenth Amendments. By now the breadth of Congressional power to enforce these provisions is hornbook law.

In a series of cases dating back more than fifteen years, the Supreme Court has recognized that Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment grant Congress broad power to enact appropriate legislation to enforce the rights protected by those amendments.[149]

In *South Carolina* v. *Katzenbach*, sustaining key provisions of the Voting Rights Act of 1965, the Supreme Court noted that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." [150]

Specifically, the Court has long held that Congres need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the Congressional determination that the legislation furthers enforcement of the amendment. The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself.

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[144] 639 F. 2d 1383 (5th Cir. 1981); compare *Cross* v. *Baxter*, 604 F. 2d 875 (5th Cir. 1979).

[145] *Kirksey* v. *City of Jackson*, slip opinion 14628 (March 5, 1962); *Jordan* v. *City of Greenwood*, No. GC 77–51–WK–P, Slip Opinion, pp. 29–30. (N.D. Miss. 1982).

[146] *Bolden* v. *City of Mobile*, Civil Action No. 75–297–P (S.D. Ala., April 15, 1982).

[147] *United States* v. *Marengo County Commission*, C.A. No. 78–474–H (S.A. Ala., 1981). Slip Opinion at p. 3; see also *Washington* v. *Findlay*, 664 F. 2d 913, 920, 923 (4th Cir. 1981).

[148] *United States* v. *South Carolina* (dismissed) CA. No. 80–730–8 (D.S.C.); *United States* v. *City of Hattiesburg*, CA No. H–78–0147(c) (S.D. Miss. July 8, 1980). See House hearings, at pp. 2535, 2562.

[149] *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v *Mitchell*, 400 U.S. 112 (1970); *City of Rome* v. *United States*, 446 U.S. n. 10, at 173; *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

[150] 383 U.S. at 326.

South Carolina specifically upheld the Act's ban on literacy tests, even though the Court had earlier held that the use of such tests did not *per se* violate section 1 of the Fifteenth Amendment and that such tests would only be struck down in a constitutional challenge if they were employed in a discriminatory manner.[151]

Congress may enact measures going beyond the direct requirements of the Fifteenth Amendment, if such measures are appropriate and reasonably adapted to protect citizens against the risk that the right to vote will be denied in violation of the Fifteenth Amendment. That point, clearly established in *South Carolina*, has not been seriously challenged in subsequent years.

The proposed amendment to section 2 of the Voting Rights Act is fully consistent with this line of cases.

The prevailing opinion of the Supreme Court in *Bolden* held that proof of discriminatory intent is a requirement to establish a violation under the Fourteenth and Fifteenth Amendments.[152] However, on the very same day that *Bolden* was decided, the Supreme Court, in the *Rome* case, explicitly upheld Congress' power to provide in Section 5 of the Act that a proposed voting law change may be rejected on grounds either of discriminatory purpose or of discriminatory effect.[153]

In a case decided several months after *Bolden*, *Fullilove* v. *Klutznick*, Chief Justice Burger, writing for the Court, reviewed the cases and reiterated the Congressional power to protect voting rights though statutes that do not require proof of intent.[154]

The Committee has concluded that to enforce fully the Fourteenth and Fifteenth Amendments, it is necessary that Section 2 ban election procedures and practices that result in a denial or abridgment of the right to vote. In reaching this conclusion, we find (1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted; and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination.[155]

As Archibald Cox, a leading Constitutional scholar, testified:

> Congress has the power to outlaw all voting arrangements that result in denial or abridgment of the right to vote even though not all such arrangements are unconstitutional, because this is a means of preventing their use as engines of

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[151] *Lassiter* v *Northampton Board of Elections*, 360 U.S. 455 (1959).

[152] The 1975 amendment to section 2, which parallels by cross reference the extension of the special provisions to certain language minorities, was premised upon the Fourteenth Amendment, so the Congressional power provision now rests on both amendments.

[153] It is clear, then, that under section 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate section 1 of the amendment, so long as the prohibitions are appropriate as that term is defined in *McCulloch* v. *Maryland* and *Ex Parte, Virginia*. . . . In the present case, we hold that the Act's ban on electoral poses of the Fifteenth Amendment, even if it is assumed that section 1 of the Amendment prohibits only international discrimination in voting." 446 U.S. at 177.

[154] 448 U.S. at 477 (1980).

[155] *City of Rome, supra*, 447 U.S. at 176, 177. (Congress may prohibit state actions which do not involve purposeful discrimination themselves, but which "perpetuate the effects of past discrimination" or which "create the risk of purposeful discriminaton.")

purposive and therefore unconstitutional racial discrimination.[156]

We are also aware of several collateral questions that have been raised about this exercise of Congressional power. We believe they are easily answered.

It has been suggested that the Committee bill would overturn a constitutional decision by the Supreme Court, in spite of the strenuous opposition of some of the bill's proponents to unrelated Congressional efforts to override Supreme Court decisions in other areas by statute rather than by constitutional amendment.

This argument simply misconstrues the nature of the proposed amendment to section 2. Certainly, Congress cannot overturn a substantive interpretation of the Constitution by the Supreme Court. Such rulings can only be altered under our form of government by constitutional amendment or by a subsequent decision by the Court.

Thus, Congress cannot alter the judicial interpretations in *Bolden* of the Fourteenth and Fifteenth Amendments by simple statute. But the proposed amendment to section 2 does not seek to reverse the Court's constitutional interpretation. Rather, the proposal is a proper statutory exercise of Congress' enforcement power described above and it is not a redefinition of the scope of the Constitutional provisions. As American Bar Association President David R. Brink emphasized:

> Under this amendment, the Supreme Court's interpretation of the proper constitutional standard would be left intact. Only the section 2 statutory standard would be changed to reinstate the prior legal standard.[157]

As Professor Cox noted, the proposed amendment to section 2 is clearly distinguishable from proposals pending in the 97th Congress to offset substantive Supreme Court interpretations of the Constitution by simple statute.[158]

Unlike legislation proposed in other areas, S. 1992 does not attempt to restrict the federal court's jurisdiction in any way. It does not direct the result or the remedy that courts may reach with respect to claims brought under the Fifteenth or Fourteenth Amendments. Nor does it purpose to redefine terms in either amendment for purposes of constitutional adjudication.

Another question raised by several witnesses in the Subcommittee hearings is whether Congressional authority to enact the amendment to Section 2 is contingent upon a detailed showing of voting rights discrimination throughout the country. They suggest an analogy to the record of abuse in covered jurisdictions that the Supreme Court emphasized in *South Carolina* v. *Katzenbach*, as one basis for upholding

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[156] Prepared statement, p. 14, Cox testimony, Senate hearings, February 25, 1982. The Committee also found persuasive the exhaustive analyses of Professor Norman Dorsen, another distinguished constitutional scholar, whose testimony and prepared statement focused primarily on the constitutional issues. Professor Dorsen concluded that the amendment to section 2 was within Congress' power to adopt methods it rationally concluded were necessary to enforce the Fourteenth and Fifteenth Amendments. Senate hearings, Feb. 4, 1982, p. 10.

[157] Prepared statement of David R. Brink, p. 7, Senate hearings, February 25. Insofar as the *Bolden* decision also involved an interpretation of section 2 of the Voting Rights Act, the Committee amendment of that provision would, of course, change the result. While the Court is the ultimate arbiter of what enacted statutes mean, Congress unquestionably has the power to amend a statute if the Court's interpretation indicates that a clarification of the Congressional intent is required.

[158] Testimony of Archibald Cox, p. 15.

the imposition of preclearance on those jurisdictions. The Committee finds this concern equally without merit because the analogy to section 5 is fatally flawed for several reasons.

First, the analogy overlooks the fundamental difference in the degree of jurisdiction needed to sustain the extraordinary nature of preclearance, on the one hand, and the use of a particular legal standard to prove discrimination in court suits on the other.[159] It is erroneous to assume that Congress is required for this amendment to put forth a record of discrimination analogous to the one relied on by the Court in *South Carolina* when it upheld section 5. As Professor Dorsen testified:

> While nationwide racial discrimination in voting might be necessary to justify or make "appropriate," extending section 5 to the entire country, such finding would be unnecessary to justify amending section 2 because it is less intrusive on state functions. As Justice Powell has stated "(p)reclearance involves a broad restraint on all state and local voting practices . . . ." *City of Rome* v. *United States*, 446 U.S. at 202–203, n. 13 (Powell, J. dissenting). By contrast, amended section 2 does not require federal preclearance of anything: it merely prohibits practices that can be proven in a court of law to have discriminatory results.[160]

Second, the *South Carolina* decision emphasized the record of abuse in the covered jurisdiction, in part, in response to the claim that the areas designated for special coverage were unjustifiably singled out. By definition, no such issue arises in the case of provisions with literally nationwide application, such as section 2 of the Act.

Third, this criticism of Section 2 overlooks Supreme Court decisions subsequent to *South Carolina* indicating that Congress can use its Fourteenth and Fifteenth Amendment powers to enact legislation whose reach includes those without a proven history of discrimination. Most pertinent, in *Oregon* v. *Mitchell*, the Supreme Court upheld the provision of the Voting Rights Act that prohibited literacy tests nationwide, even though there were no findings of nationwide discrimination in voting, let alone findings that literacy tests had been used to discriminate against minorities in every jurisdiction in the country.[161] These cases make clear that Congress has authority to amend

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[159] The latter is not an extraordinary intrusion upon the normal allocations of functions within the federal system. The Supreme Court has repeatedly recognized the power of Congress to prescribe rules of evidence and standards of proof in the federal courts. As the Court noted in *Vance* v. *Terrazas*, "(t)his power . . . (is) rooted in the authority of Congress conferred by Art. 1, section 8, cl. 9 of the Constitution to create inferior courts. . . ." 444 U.S. 265–66 (1980).

[160] Norman Dorsen, prepared statement, p. 5.

[161] Similarly in *Fullilove, supra*, the Court upheld the constitutionality of a minority set-aside provision contained in the Public Works Employment Act of 1977. Chief Justice Burger recognized that the set-aside applied not only to contractors who had previously discriminated, but also to those with no record of racial discrimination. In *Oregon* v. *Mitchell*, the various opinions did note general evidence before Congress about the danger that literacy tests might have a discriminatory impact because of past official discrimination, and their general susceptibility to manipulation. But the hearing record before this Committee and the House Committee includes testimony as to the existence of discriminatory practices outside of the covered jurisdictions, including cases already adjudicated against various non-covered jurisdictions. Moreover, there was substantial expert testimony that to require proof of intent on a case-by-case basis risks perpetuating the effects of past discrimination and risks failing to find purposeful discrimination. That testimony was not based on analysis confined to a particular geographical region, but rather on the inherent inadequacies of the intent test, itself.

Section 2, in the absence of adetailed record of nationwide voting discrimination, because even if there were some over-inclusion of jurisdictions it would be constitutionally permissible.

The most important flaw in the analogy, however, is the assumption that, without a prior detailed Congressional finding of discrimination in the areas to which it applies, Section 2 would be overinclusive. This ignores the very terms and operation of the provision, which confine its application to actual racial discrimination. Unlike the minority set-aside provisions in *Fullilove* and the nationwide literacy test ban in *Oregon*, Section 2 avoids the problem of potential overinclusion entirely by its own self-limitation. Section 2 does not completely prohibit a widely used prerequisite to voting which is not facially discriminating. (e.g. literacy tests in *Oregon*) or require an entire class of individuals to satisfy a particular requirement in order to qualify for participation in a federal activity (e.g. minority set-asides in *Fullilove*). Rather, the proposed amendment to section 2 would only invalidate those election laws where a court finds that discrimination, in fact, has been proved.

VII. BAILOUT

A. Summary

The bill contains a substantial revision of the so-called "bailout" provisions of the Voting Rights Act. Bailout relates to the procedures by which a covered jurisdiction can remove itself from the preclearance requirement to Section 5 and the other special remedies under the Act.

Under present law, the bail-out mechanism would as a practical matter, keep the covered jurisdiction subject to Section 5 until a fixed calendar date. The revised bailout mechanism is geared to the actual record of conduct in each jurisdiction. Those with a record of compliance with the law in recent years and a commitment to full opportunity for minority participation in the political process could bail out. Other jurisdictions would have to compile such a record in order to become eligible. Only those jurisdictions that insist on retaining discriminatory procedures or otherwise inhibit full minority participation would remain subject to preclearance. Indeed, the net effect of the Committee bailout is to make it possible for jurisdictions which have obeyed the law and accepted minority participation to remove themselves from Section 5 coverage well ahead of the 1992 date proposed by the Constitution Subcommittee bill.

Nevertheless, the Committee was willing to meet concerns that Section 5 might be perceived as a permanent responsibility by some persons in the covered jurisdictions. The substitute bill includes an additional 25 year "cap" on Section 5, at which point preclearance would end unless Congress found that extension of preclearance was still necessary.

If no further action is taken by Congress before August 6, 1982, virtually all of the remaining jurisdictions which came under Section 5 with the original passage of the Voting Rights Act in 1965 will be able to show that they have not used a test or device in a discriminatory manner for 17 years, that is, since August 6, 1965.[162]

[162] They will be able to do so for the simple reason that the Act required such jurisdictions to suspend the use of *any* test or device on that date. Since such jurisdictions presumably have not used *any* test or device for 17 years, they could by definition, establish that they have not used a test or device in a discriminatory manner.

This would constitute virtual automatic termination of Section 5 coverage as to those jurisdictions. As noted in Section 5 of this report, there is broad consensus that such automatic termination would be wholly unwarranted because of the continuing problems of discrimination and widespread failure to comply with the Voting Rights Act in the covered jurisdictions.

Nevertheless, the Committee agrees with the conclusion of the House of Representatives that revision of the bail out provision is appropriate in order to provide incentives to jurisdictions to attain compliance with the law and increasing participation by minority citizens in the political process of their community. Accordingly, the revised bail-out criteria relate to the jurisdiction's recent record of behavior rather than to a mere calendar date.

The Committee believes that this new bailout will provide additional incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and to improve existing election practices so that full opportunity for minority participation will finally be realized. It is calculated to permit an effective and orderly transition to the time when such exceptional remedies as preclearance are no longer necessary. This bailout was carefully crafted to preserve the essential protections of Section 5. The provisions work as an integrated complementary whole; removing any element would seriously undermine the entire structure.

The Committee has considered and rejected suggestions that the bailout provision be weakened by further revisions. The new bailout already constitutes a very substantial liberalization of the avenues available to covered jurisdictions to end their preclearance obligation.

For example, individual counties in covered states for the first time will be able to bail out separately even though the state as a whole is not yet eligible to do so. The law will now recognize and reward their good conduct, rather than requiring them to await an expiration date which is fixed regardless of their actual record.

At the same time, the revised bailout does not, and should not, provide an easy hatch for jurisdictions which have continued to violate the law in recent years and deny minorities access to the political process.

Most of our colleagues in the Senate have heralded the broad consensus on extending Section 5, as recognition of the one way to assure continued protection of minority voting rights. Yet if we turn the bail-out into a sieve, it would make the extension of Section 5 an exercise in futility and a cruel hoax on millions of black and brown Americans. We believe that the extension of preclearance could prove a hollow victory if an excessively easy bail-out provision is enacted. That would constitute a back-door repeal of Section 5, since many communities where preclearance is still needed would be able to escape coverage.

The Committee believes that the new bail-out provisions provide a balanced compromise between protecting minority voting rights and eradicating the continuing effects of past discrimination, on the one hand, and allowing jurisdictions with clear records to terminate Section 5 coverage, on the other. They offer a firm but fair and achievable set of standards for determining when a jurisdiction's preclearance obligations should end.

B. CURRENT LAW

The Voting Rights Act at present contains a bailout provision in Section 4(a). Existing law permits jurisdictions to end their preclearance obligation upon showing they have not used a test or device to discriminate for the designated number of years. For most jurisdictions, this amounts to a calendar measurement of Section 5 coverage starting from the year of their initial coverage, i.e., 1965, 1970 or 1975.

Between 1965 and 1970, the following jurisdictions successfully sued to exempt themselves from coverage: Alaska; Wake County, North Carolina; Elmore County, Idaho; and Apache, Navajo and Coconino Counties, Arizona. The 1970 amendments resulted in most of these areas being re-covered. Since 1970, the current bailout procedure had been used successfully by 23 jurisdictions which have not been recovered.

C. COMMITTEE BILL

At present, all counties in a covered state must remain subject to Section 5, no matter how good their individual records are, until and unless the state itself bails out. The Committee bill contains another significant easing of the bailout provisions in current law. For the first time individual counties within a fully covered state will be permitted to file for bail-out even though other counties and the state government, itself, are not yet eligible to do so. This is a major change.

In order to understand the bail-out issue, it is necessary to know the evolution of the bail-out provision presently in S. 1992.

During the House hearings, Representative Hyde and several witnesses noted that any progress which jurisdictions had achieved since 1965 would not count under the existing bail-out mechanism. Representative Hyde suggested that a bail-out be provided to (1) take account of the good behavior that some jurisdictions might be able to demonstrate and (2) to give an incentive to others to fully accept minority political participation. He suggested providing incentives for covered jurisdictions to do more than maintain the status quo. He said bailout should encourage jurisdictions to make their electoral systems more accessible to all eligible voters, and to reward those "saintly" jurisdictions which had fully complied with the letter and spirit of the law. Mr. Hyde recognized that his second reason, regarding "saintly jurisdictions," may have been based more on theory than practice.[163]

There was a dearth of evidence in both the House and Senate hearings to document theexistence of jurisdictions with a record of complete compliance and which had made constructive efforts to involve minority voters.[164]

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[163] House hearings, at 1822: "But generally, the idea of an improved bail-out where those jurisdictions—and I don't have any in mind because I don't know, but I'm assuming there are some jurisdictions that have lived up to the act, both the letter and the spirit, and deserve to be treated like everyone else, and even if there aren't, the prospect that there is some way to get out for good behavior has this incentive factor that will enhance, really, the purpose of the Act."

[164] Julius Chambers, President of the NAACP Legal Defense Fund, testified, "If it is agreed that there is a continued need for Section 5 and that it should be extended, I feel compelled to ask why there is a need to change the bail-out provisions. I am not persuaded that there are saintly jurisdictions in North Carolina whose black voters no longer need the protections of continued preclearance. Of the 193 state legislative enactments since 1965 concerning voting changes in the covered counties, few, if any, involved attempts to improve the opportunity for blacks to participate." "Those counties with significant black population or under coverage of the Voting Rights Act made more changes with a negative effect on black partiiaption than did other counties in North Carolina." Senate hearings, February 12, 1982, p. 19.

Representative Hyde eventually proposed a bail-out scheme similar to the one in S. 1992, under which jurisdictions would have to demonstrate full compliance with the law for ten years and also would have to show they had made constructive efforts to permit full participation by minorities. This behavior oriented standard gave covered jurisdictions the incentive to do more than simply maintain a status quo that grandfathered in pre-1965 election laws and practices that were discriminatory.[165]

Initially, the witnesses representing minority voters in the House hearing opposed such an addition to the present law on the grounds that no real need for it had been established and that jurisdictions should not require any additional incentive to obey the law or to accept political participation by minorities.[166]

Ultimately, however, in order to expedite passage of this vital measure they agreed to support a compromise bail-out provision developed by Representatives Peter Rodino, James Sensenbrenner, Hamilton Fish, and Don Edwards. It substantially followed the framework of Representative Hyde's July 30 proposal, although it differed in some important particulars. This was a very difficult concession for those representing the interests of millions of minority citizens, as anyone familiar with the House proceedings is well aware.

The compromise bail-out was reported by the House Judiciary Committee as a substitute amendment to H.R. 3112 by a vote of 23 to 1. Efforts to relax various elements of the bailout were all defeated on the House floor by overwhelming margins after substantial debate. The House agreed with the architects of the Committee bill that the provision was fair and reasonable, and that to loosen the standards would risk crippling Section 5. Some House members were dissatisfied with the compromise bail out. They argued that the standards would be impossible to meet. Their position was decisively rejected.

The Committee bailout retains the twofold criteria of the House bill. First, the jurisdiction must show a ten-year record of full compliance with the Voting Rights Act and the constitutional protection of the right to vote. Second, it must demonstrate that it has taken positive steps to achieve full minority access to the political process. A ten-year extension of the bail-out provision in current law, as some continue to urge, would preclude all jurisdictions, even those with good records, from bailing out until that decade expires.

By contrast, the Committee bail-out is a recognition that the passage of time, by itself, means very little. In short, the new bail-out focuses on criteria more relevant to whether continuing coverage is warranted than does an inquiry that looks only at the jurisdiction's conduct 17 year ago.

D. Ten Year Record Of Good Behavior

The bailout utilizes a ten-year reference period for the first part of the new criteria:

> A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding

[165] House hearings, at 1879, 1852, 1860, 2124.
[166] Bailout proposal of Rep. Hyde (printed and circulated for committee use) July 30, 1981.

the filing of the action, and during the pendency of such action, [the required elements have been satisfied]

This ten-year period is necessary to ensure that a genuine record of nondiscrimination is achieved by jurisdictions seeking to bail out.

Representative Hyde's July 30 bail-out proposal used the same ten-year period.

The requisite record involves three elements: compliance with the special provisions of the Act; no adjudication of discrimination; and no assignment of examiners.

It should be noted that even if a jurisdiction has failed to comply with every single one of these criteria until the present legislation is enacted, it will now be on notice of what will henceforth be required to bail out. Assuming it desires to bail out and fully complies with the laws protecting voting rights from that point on, it would be able to demonstrate a ten-year track record no later than 1992, which is the earliest it would have been able to bail-out under a straight ten-year extension of existing law.

1. Compliance With the Voting Rights Act

The jurisdiction must show that it has fully complied with the special provisions of the Voting Rights Act for the previous 10 years.

That is, the jurisdiction must show that it has not:

used a discriminatory test or device,

failed to obtain preclearance before implementing covered changes in its laws,

enacted changes which were discriminatory and, therefore, objected to under Section 5.

Discriminatory Test or Devices

The first of these should not pose a significant hurdle to any jurisdiction. As we have pointed out, those jurisdictions which came under Section 5 in 1965 have been forbidden to use a test or device at all, whether or not it was shown to be discriminatory. Indeed, since 1970, there has been a nationwide prohibition on the use of "tests or devices."

2. Timely Submission of Proposed Changes

The jurisdiction must have fully complied with Section 5 of the Act, including the requirement that no covered change in its laws has been implemented without preclearance.

Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law. The Supreme Court has recognized that enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.[167]

The extent of non-submission documented in both the House hearings and those of this Committee remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to

[167] *See, e.g. Perkins* v. *Matthews*, 400 U.S. at 396 ("[F]ailure of the affected governments to comply with the statutory requirement (of voluntary submissions) would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act").

submit changes before implementing them and submitted them only, if at all, many years after, when sued or threatened with suit.[168]

Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

Prospectively, if bail-out were not made dependent on a record of timely submissions, there would be no incentive for jurisdictions to take seriously that requirement. This would further undermine the Justice Department's ability to enforce the Act in the future.

The Committee has rejected two arguments raised against this requirement.

First, it was suggested that it is too hard to know what has to be submitted, and bailout should not be denied for "inadvertence."

For many years the submission requirements of Section 5 have been well understood. Since bail-out applications may not commence until 1984, the ten year record would only have to reach back to 1974. That is almost a decade after the Act became law. It is almost five years after the Supreme Court clarified the scope of preclearance as to what kinds of changes were covered. Since 1974, jurisdictions have not been in a position validly to question their preclearance obligations.

Even if a small community, without a large legal staff, was unsure of its obligations, it could have asked the State Attorney General's office for guidance—and many jurisdictions did.

Second, this criterion was questioned as attaching undue significance to technical compliance with the Act. It was suggested that there are an endless number of possible submissions, e.g., not simply for a change in polling place location, but also for a rearrangement of the tables within the same premises. The argument is that a jurisdiction could always be found guilty of failing to submit some minute element.

This is not a plausible reservation. Courts and the Department of Justice have used, and would continue to use, common sense on changes that are really *de minimis*. There is no cited instance of a jurisdiction's election being successfully challenged for failing to submit such minutiae.

The ten years would run from the last date upon which an unsubmitted change had been implemented or was in effect.

The rights of voters under the Voting Rights Act are violated not only when the voting change is first enforced without preclearance, but thereafter while it remains in force without having been precleared. Therefore, this requirement applies even if the voting change, when ultimately submitted, was not found objectionable.

Lastly, it is the Committee's intent that compliance with Section 5 means that even if an objection is ultimately withdrawn or the judgment of the District Court for the District of Columbia denying a declaratory judgment is vacated on appeal, the jurisdiction is still in violation if it had tried to implement the change while the objection or declaratory judgment denial was in effect.

Objections and Denial of Declaratory Judgments

The bailout requires that the Attorney General must not have objected to any submissions under Section 5 for a ten-year period. The

[168] *See*, e.g. Testimony of Julius Chambers, Senate hearings Feb. 12, 1982 (Statement, pp. 12–13); Laughlin McDonald, Id. Jan. 28, 1982 (Statement, pp. 2–3), Transcript of Hearing at 104 Drew S. Days, Id. Feb. 12, 1982 at 64; Statement of Steve Suitts, Feb. 1, 1982, p. 5, Julian Bond, House hearings, pp. 225, 227, 228–29, 232.

Supreme Court has indicated that the record of objections is relevant to the need for continued coverage.[169]

As in the case of timely submissions, even those who opposed the House bailout criteria acknowledged that the "no objection" rule was "founded upon a general basis of assuring compliance . . ." [170] The record reveals that about half of all the objections entered since the enactment of the 1965 Act occurred in the five years since the last extension in 1975.

Nevertheless, several arguments were raised against this requirement. First, it was suggested that a politically motivated Attorney General could bar bailout by filing objections for that purpose. That hypothetical concern is easily answered. Under Section 5, the jurisdiction can "appeal" objections to the courts, in the sense that it may file a *de novo* declaratory judgment action for District Court approval.

A second argument was that objections are not probative if the Attorney General objects simply because he has inadequate information on which to base a decision. In fact, there have been only a handful of objections on this basis. In those cases where the jurisdiction has subsequently supplied the missing information within a reasonable amount of time, the Attorney General has withdrawn the objection. More often, but still in less than 5 percent of the submissions, the Attorney General has asked for more information, and pursuant to Department regulations, the statutory period is tolled until he receives it. He would only object if the jurisdiction flatly refused to supply the necessary information.[171]

The third argument was that the jurisdiction may not be able to determine whether a change is objectionable and may simply submit it for the Department's determination. In fact, jurisdictions can and do informally discuss proposed changes in advance with the Department. The Department suggests that minority input be obtained and notes what factors must be taken into account to ensure that a change is acceptable. The Committee believes that a jurisdiction which desires to make sure its change will not be objectionable can do so. As is true for submission requirements, smaller jurisdictions can seek advice from the State Attorney General, as has been done by and large successfully in Virginia.

Nor is the question of "trivial changes" a significant problem. A review of the objection letters, reveals that the Attorney General takes this responsibility seriously. Trivial objections simply are not entered.

There was some confusion at the hearings about whether there are two kinds of "withdrawal" of objections. First, after an objection, the jurisdiction may submit a request for reconsideration of the same proposal, supported by new information. If the new information is submitted within a reasonable time, and if the Attorney General subsequently withdraws the objection, it is the Committee's intent that such "objection" not bar bailout. On the other hand, if after an objection is entered, the jurisdiction submits a new revised change and it is approved, then the objection to the initial submission shall still count as an objection which bars a bailout. The fact that the jurisdic-

[169] City of Rome, *supra*, 446 U.S. at 181.
[170] Subcommittee Report, p. 58.
[171] This regulation was instituted in 1971 at the insistence of Congress in order to insure that objections not be entered when the availability of additional information might avert an objection.

tion agreed to submit a non-discriminatory change, after having failed to get an objectoinable one approved, should not permit bailout.[172]

Finally, the Committee was disturbed by testimony that the Department of Justice has at times withdrawn objections without a documented basis of substantially changed circumstances, several years after the objection was entered.[173]

Unsubstantiated withdrawals of objections do not obviate the significance of the previous objection for purposes of these bailout standards.

Judgments in Voting Rights Litigation

The second element of the criteria prohibits bailout by jurisdictions that have lost voting rights litigation; have entered into certain kinds of consent judgments; or have an action pending against them for denial or abridgement of the right to vote.

A final judgment that it has denied or abridged the right to vote is strong evidence that the jurisdiction has not abided by the principles upon which the Act is founded, and has not acted in food faith.

Consent Decrees

As a corollary to the requirement of no judgments within the ten year period, bailout is also precluded for any jurisdiction that has entered into a consent decree settlement or agreement resulting in the abandonment of a voting practice challenged.[174] A consent decree abandoning a challenged voting practice is an admission that the practice was, in fact, unlawful and discriminatory.[175]

Critics of this element have argued that settlements are entered into for a variety of reasons, e.g., to avoid the nuisance or expense of litigation.

Under this section, however, *not all consent decrees* are bars to bailout, but only those consent decrees which *include the abandonment of the challenged practice.* A city or county is not likely to agree to major changes in its election system, such as switching from at-large to district elections, *merely to avoid the nuisance* of a suit. It is likely to do so only after discovery and pretrial review indicates legal vulnerability.[176]

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[172] The same reasoning appiles to proposed changes which are subsequently approval because of new circumstances which lessen their objectionable impact. Since they were objectionable when first proposed by the jurisdiction, the initial objection would still count for purposes of this section.

[173] The Attorney General has in some cases withdrawn objections long after they were entered, as many as five years later (Jackson, Miss.). Testimony of H. J. Kirksey, February 2, 1982, p. 9. This undermines the statutory scheme, especially in light of the new bailout procedures. Unless withdrawals are limited to those where a request for reconsideration is filed shortly after the objection, jurisdictions with objections could be eligible for immediate bailout by seeking untimely withdrawal. This would remove a significant protection that the law affords to minority voters. They may always submit a new proposed change.

[174] The number of such consent decrees that would affect bailout is small—fewer than two dozen since 1974, so the retrospective impact of this provision would be limited. The phrase, "consent decrees, settlements, and arrangements" is limited to situations where such agreements are entered into after litigation has commenced; an agreement to forestall litigation would not bar bailout.

[175] Cf., *United States* v. *Columbus Separate School District*, 558 F. 2d 228, 230 n. 8 (5th Cir. 1977), *cert. denied*, 434 U.S. 101 (1978); *United States* v. *Seminole County School District*, 553 F. 2dd 992, 996 (5th Cir. 1977) ("by consenting to the decree in 1970, the Board admitted the original constitutional violation").

[176] *See*, Hearing transcript of Jan. 28, 1982, testimony of Laughlin McDonald, *supra*, at 105; Julius Chambers, *supra*, statement at pp. 13–14.

Moreover, a review of the consent decrees that actually have been entered into reveals that they involved the abandonment of a significant feature of the defendant's electoral process.[177] In such cases, the importance of providing strict protection of a fundamental right—the right to vote—outweighs the general policy of encouraging settlement.

A proposal that consent agreements not bar bailout was defeated on the House floor by a vote of 285–92. The proposal was that a court might consider a consent decree but would bar bailout only if the court found that the decree reflected underlying discrimination.

We agree with the House rejection of this alternative. Before a decree was entered, there may have been extensive discovery, pretrial motions or even portions of a trial. A different court, unfamiliar with all of those proceedings, should not have to sift through a stale record several years later, in order to decide whether there was liability on the part of the defendant. That would make little sense, as a matter of judicial administration or effective protection of minority rights. The inherent impracticality of the proposal underlines the need for a per se standard, whenever a consent decree includes the abandonment of the challenged practice.

Pending Suits

A second corollary of the "no adverse judgments" criterion is that a decree granting a bailout must await final judgment in any pending suit that alleges voting discrimination.

The purpose of the bailout criteria is to permit covered jurisdictions with a "clean slate" and a history of compliance with federal voting rights guarantees to become exempt from coverage of Section 5 of the Voting Rights Act. A pending suit raises substantial questions about whether a jurisdiction is in full compliance with the law. If the lawsuit results in a judgment finding voting rights violations, that would bar the bailout. It is the judgment of the Committee that the risk of allowing a jurisdiction to bail out when it may be found soon thereafter to have discriminated substantially outweighs the mere delay in obtaining a bailout judgment.

As for any concern with frivolous lawsuits being filed to bar bailout, the answer is that there are many provisions in the present law which safeguard against such suits. A number of legal experts, including the President of the American Bar Association, David Brink, testified that the rules of federal procedure arm judges with sufficient power to throw out insubstantial complaints.[178]

The recapture provision [179] is not completely adequate to deal with the possibility of allegations of voting rights violations because some of the criteria—such as the requirement of no objections and no nonsubmissions and no federal examiners—cannot bring about recapture because they do not apply to a jurisdiction once coverage is lifted. Once

[177] *See* Transcript of testimony of Laughlin McDonald, supra, at 105, 106–107; Lawyers Committee Mississippi Report (September 1981), pp. 41–43, (attachment to testimony of State Senator Henry J. Kirksey) Senate Hearings, February 2, 1982.

[178] The concern that frivolous lawsuits might be filed to defeat bailout is not realistic. Costs and attorneys fees may be assessed against those who file frivolous lawsuits, including the attorneys involved. Rule 56, Fed. R. Civ. P., Rule 38, Fed. R. App. P., 42 U.S.C. Sec. 1973l(e). In addition, summary dismissal, summary judgment, and expedited appeals procedures exist to give additional protection against the abuses of court procedures. Federal Rules of Civil Procedure, Rules 12,56.

[179] See infra p. 131–132.

it had escaped it might be difficult or time-consuming to establish that a jurisdiction should be recaptured on the basis that it had been involved in activity that would have barred bail out prior to the exemption from pre-clearance.

During the House debate it was suggested that a group could prevent bailout by a series of frivolous lawsuits, even if each one were eventually dismissed, so that a constant turn-over of pending actions would prevent bailout. To meet this concern, the bill was amended by the manager, Congressman Don Edwards, on the House floor, so that suits filed *after* the bailout application has been made *do not count* as "pending suits" which block bailout.

Federal Examiners

Bailout is precluded if "examiners" have been sent to the jurisdiction within the previous ten years. Section 6 of the Act, —— U.S.C. ——, provides for the appointment of federal examiners if: 1) the Attorney General has received at least 20 meritorious written complaints from residents of the locality charging discriminatory denial of the right to vote; or 2) the Attorney General believes that the appointment of examiners is necessary to enforce federally protected voting rights.

The Report of the Subcommittee on the Constitution argues that the assignment of federal examiners is too much a matter within the subjective judgment of the Attorney General and beyond the control of the jurisdiction to be used as an indicator that the jurisdiction engaged in any wrong-doing. In response to this objection, there was testimony that the Attorney General must follow standards in assigning examiners, which protect against unjustified assignments.[180] In addition, there is nothing in the record before the House or the Senate Subcommittee suggesting that any assignment of examiners in the past was unjustified.[181]

The assignment of examiners is a good indication of voting rights abuses at the local level. The significance of Federal examiners was recognized by the Supreme Court in *South Carolina* v. *Katzenbach*. The Court said that § 6(b) set adequate standards to guide the Attorney General and protected against arbitrary use of the appointment process.

It is the Committee's judgment that these guidelines offer sufficient assurance of the genuine need for assigned examiners, and sufficient

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[180] In determining whether to assign examiners, the Attorney General is required by Section 6 to consider whether the ratio of non-white to white registered voters is related to voting rights violations; and whether bona fide efforts are being made by the jurisdiction to comply with the Act. Specifically, the Attorney General considers (1) voter registration office hours, (2) the location of the office in relation to areas where black registration is low, (3) intimidation or violence, (4) whether standards are applied differently to white and black applicants. *See,* prepared statement of J. Stanley Pottinger, Assistant Attorney General Civil Rights Division at pp. 537–38, 584–85, Hearings on the Extension of the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, April 29, 1975; letter of Assistant Attorney General Reynolds to Senator Hatch, February 25, 1982. These examiners and observers are sent very sparingly. Moreover, a look at the counties where they have been sent shows that these are the counties with serious issues of voting rights abuses.

[181] To the contrary, both the current and a former Assistant Attorneys General who appeared before the Senate Subcommittee on the Constitution testified that the decision to send federal examiners has not been abused. *See,* testimony of William Bradford Reynolds, March 1, 1982, pp. 134–135; and Drew S. Days, February 12, 1982, pp. 9–10. Moreover, Professor Days also testified that in his experience the need for federal examiners was an excellent index of the existence of continued voting rights abuse. Statement at 18, transcript of Hearing at 84–85.

reason that bailout suits should not be opened to a complex relitigating of whether each assignment of federal examiners was justified.[182]

Examiners may be assigned either to register minority voters; or because the Act requires them as a precondition to sending in election day "observers." [183] Under this section their assignment for either reason would bar bailout.

Other Voting Rights Violations by the Applicant Jurisdiction

No declaratory judgment cauld be issued if the plaintiff had engaged in any violation of laws protecting voting rights. This safeguard will permit evidence to be presented of voting rights infringements which have not previously been the subject of a judicial determination. However, such violations would not bar bailout if "the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated."

No violation of constitutional or statutory protections against discrimination in voting should be presumed to be trivial, and the jurisdiction has the heavy burden to show that any such violations were trivial, promptly corrected, and not repeated. For example, if a qualified minority voter has been turned away from the polling place by accident or mistake in the jurisdiction's poll books, and the mistake was immediately corrected and not repeated, this would not bar bailout. However, if a voter or poll watcher had been attacked or beaten up at the polling place by a public official or with the participation or acquiescence of election officials, this would not be considered trivial even if corrected and not repeated.

E. Positive Steps To Increase Minority Participation

The bailout provision also requires that the jurisdiction undertake positive steps:

> to eliminate intimidation and harassment of minority voters;
> to expand opportunities for minority participation; and
> to eliminate voting procedures and methods which inhibit or dilute equal access to the electoral process.

Beyond the outright elimination of discriminatory barriers, the applicant jurisdiction must make constructive efforts to eliminate the continued effects of many years of discrimination in order to be relieved of special obligations under the Act. The Supreme Court found it appropriate for Congress "to counter the perpetuation of 95 years of pervasive voting discrimination." *City of Rome* v. *United States*, supra, 446 U.S. at 182.

This aspect of the bailout process was designed as much as possible to create objective standards by which to determine whether the jurisdiction has compiled a record of significant progress—and to avoid too vague or subjective a standard. The litigation will chiefly be an inquiry into these objective questions.

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[182] Congress' concern that bailout suits not be overly complicated is particularly reasonable because the proposed bailout would significantly increase the number of jurisdictions that can file bailout suits.

[183] When examiners are sent as a precursor to election day observers, they also receive complaints from citizens as a basis for deciding where and how to use observers, and deciding whether to bring suit. In such situations, a telephone survey followed by a field survey in the community is made before the Attorney General will certify an area for examiners. It is a careful, considered determination.

Elimination of Discriminatory Structures

Before a jurisdiction ends Section 5 coverage, it should eliminate discriminatory voting procedures and methods of election which deny equal access to the electoral process. This does not mean that minorities must have been elected in proportion to their numbers, but only that they have an opportunity to participate on an equal basis with non-minority citizens.[184]

In determining whether procedures or methods "inhibit or dilute equal access to the electoral process," the standard to be used is the results test of *White*. In other words, the test would be the same as that for a challenge brought under Section 2 of the Voting Rights Act, as amended by the Committee bill, except that the burden of proof would be on the jurisdiction seeking to bail out. As discussed under the amendment to Section 2 of the Act, the *White* standard is one with which the courts are familiar and which has been clarified through considerable litigation. Contrary to the suggestion in the Subcommittee Report, there would not need to be a great deal of litigation to determine the scope of this requirement.

The bailout applicant would not need to "prove a negative" by establishing that each and every procedure or law relating to its elections satisfied the *White* test. However, should the Justice Department or an intervenor alleges that specific practices or election methods, other than those analyzed by the applicant—do discriminate, the applicant would have to satisfy the court as to those. With regard to any contested practice or procedure, the jurisdiction would have the burden of proving by objective evidence that it had eliminated all such procedures or methods of elections which denied equal access to the electoral process.

Constructive Efforts to Eliminate Intimidation and Harassment

The reason for the requirement of constructive efforts should be self-evident, particularly at a time of renewed concern about violence prone vigilante or para-military organizations, hate groups and other means of physical intimidation.[185] It is an essential aspect of any jurisdiction's firm commitment to ensure the full opportunity for minority participation in the political process.

Intimidation and harassment of voters or others seeking to exercise rights protected by the Voting Rights Act are especially troubling because of the long-term impact it will have on such persons and their communities.

Communities are not held absolutely liable for all acts by their private citizens. At the same time if there is evidence that such intimidation and harassment, or a credible threat of it occurring, has been a factor in limited minority participation, then the jurisdiction must take reasonable steps to eliminate that danger and to make clear that

[184] The testimony before the House Subcommittee on Civil and Constitutional Rights in hearings last year and the Senate Subcommittee on the Constitution this year showed that in covered jurisdictions today there still exist many "grandfathered" voting procedures and methods of election which pre-date 1965 and which tend to discriminatory in the particular circumstances. These include unduly restrictive registration, multi-member and at-large districts with majority vote-runoff requirements, prohibitions on single-shot voting, and others.

[185] House hearings at 289, 821, 1566, 1579, 1985; Senate Hearings, drew days testimony February 12, 1982, at 84–855; Statement of Abigail Turner, Feb. 2, p. 12.

such abhorrent activity by private citizens, officials or public employees, will not be tolerated within its territory.

These requirements are not meant to imply that the described conduct has occurred in all covered jurisdictions. However, the House and Senate committee records indicate that in many areas this requirement is still necessary to insure that minority citizens are not inhibited or discouraged from participating in the political process.

Other Constructive Efforts

This requirement is a flexible one depending upon the particular needs and conditions in the applicant jurisdiction. The court will make a determination, under traditional, equitable principles, of whether such constructive efforts have achieved a system affording full opportunity for minority participation.

The statute lists two of the most likely channels for such efforts: (1) enhanced opportunity for registration; and (2) the appointment of minority election officials throughout the jurisdiction and at all stages of the political process.

The Committee hearing record is replete with examples of restrictive registration practices and procedures, such as restricted hours and locations for registration, dual registration practices, and discriminatory reregistration requirements, which continue to exist throughout the covered jurisdictions.[186]

Registration opportunities can be enhanced through the appointment of deputy registrars who are present at locations accessible to minority citizens, offering evening and weekend registration hours, or providing postcard registration. Other examples of constructive efforts include appointment of minority citizens as deputy registrars or pollworkers, or other officials, thereby indicating to minority group members that they are encouraged to participate in the political process.

It is difficult to understand why the Subcommittee report states a belief that this provision "will not aid in overcoming past discrimination," unless the authors of that report think that the covered jurisdictions would not respond. The requirement is precisely tailored to overcome that legacy of discrimination in covered jurisdictions by giving those jurisdictions an incentive to make improvements. The Committee believes the people of those jurisdictions will meet these expectations.

Finally, the Committee bill requires a jurisdiction seeking bailout to present evidence of minority participation in order to aid the courts in determination of its eligibility for bailout. Such evidence of minority participation is one reliable indicator of whether Section 5 is still needed. A low level of participation is central to the formula that triggers Section 5 coverage.

The covered jurisdictions themselves have pointed repeatedly to increased minority registration, voting, and office-holding as evidence relevant to determining the need for continued Section 5 coverage.

While the information required about minority participation will help the court determine whether discriminatory mechanisms have

[186] House Record at 173 377–79 820, Senate Hearings, Statement of Vilma Martinez, January 27, 1982, p. 5, Statement of Rolando Rios, February 4, 1982, p. 8.

really been eliminated and their legacy overcome, there is no requirement of a specific level of minority participation. Rather, these data would be weighed by the court along with other evidence.

F. Burden of Proof

Because of the extensive evidence of continuing voting rights violations that has been presented to this Congress in testimony, studies and reports we believe it is important that a jurisdiction seeking bailout be required to present compelling evidence that it has earned the right to remove itself from Section 5 coverage. The applicant jurisdiction would have the burden of proof as to each element of the bailout criteria set forth in Section 5. This burden must be met by objective factual evidence and cannot be satisfied primarily on the basis of assertions and conclusory declarations.[187]

G. Post Bailout Probation

Under current law, a jurisdiction that bails out no longer has to preclear its voting changes. Section 4(a), however, provides that the bailout court retains jurisdiction for five years. If the jurisdiction engages in the type of conduct that would have kept it from bailing out to begin with, the bailout judgment could be set aside and the jurisdiction brought back under Section 5. This has happened once, with respect to three counties of New York, which bailed out in the early 1970s but were brought back in two years later.

The Committee bill continues this "recapture" principle. Under Section 4(a)(5), the bailout court retains jurisdiction for ten years (the longer period is necessary because the new bailout formula contains additional criteria) during which a motion to reopen the case can be filed by the Attorney General or by an aggrieved citizen if it is alleged that the jurisdiction has engaged in conduct that would have prevented it from bailing out.

Once the court reopens the case, of course, it may not set aside the bailout judgment unless that course is supported by the evidence. Conduct that would justify reinstating Section 5 coverage would include the entry of a judgment of racial discrimination in voting against the jurisdiction or the jurisdiction's readopting a voting change that had been objected to previously under Section 5.[188]

H. Responsibility for Geographically Included Jurisdictions

The Committee bill requires that, for a jurisdiction to bail out, each governmental unit within its territory must satisfy all of the criteria for bailout. The Supreme Court already has approved such a linkage concept for bailout.[189] It is appropriate to condition the right of a state to bail out on the compliance of all of its political subdivisions, both because of the significant statutory and practical control which a state has over them and because the Fifteenth Amendment places responsibility on the states for protecting voting rights.

[187] For example, protestations of good faith administration of voting procedures, or declarations that local practices are nondiscriminatory would not, standing alone, be enough to meet the jurisdiction's burden of proof. See, generally *Gaston County, North Carolina* v. *U.S.*, 395 U.S. 285 (1969); Compare *Castenada* v. *Partida*, 430 U.S. 482 (1979)

[188] For example, if a jurisdiction implemented a change which resulted in significant retrogression in minority voting strength or redistricted to dilute minority voting strength, this would be a basis for recapture.

[189] *City of Rome, supra* 446 U.S. at 162–69.

The bailout provisions in this bill contemplate the same level of state responsibility and protection as was contemplated by the framers of the Fifteenth Amendment, and the drafters of the 1965 Act.[190] The fact that counties will now have the opportunity to obtain exemption on an individual basis does not alter the constitutional responsibilities or the plenary power of the covered states to meet the standards of the Act.

States have historically been treated as the responsible unit of government for protecting the franchise. The general rule is that states "have broad powers to determine the conditions under which the right of suffrage may be exercised." [191] The power of the states is plenary except as limited by the federal constitution, *Gomillion* v. *Lightfoot*.

S. 1992 considerably expands the number of jurisdictions which are afforded the opportunity to bail out. Counties within a covered state are now eligible to bail out if they can demonstrate their record of non-discrimination. However, this new opportunity for counties should not relieve a covered state of its fundamental responsibility to protect the right to vote.[192]

The question was raised in the Committee hearings of whether a state should have to wait until all its counties are eligible to bail out before it can bail out at the state level, i.e., end preclearance as to state enactments. One suggestion, for example, was that a state should be able to bail out when two-thirds of its counties have done so. That proposal was defeated in the House by a vote of 313–95. The Committee believes such a proposal is inappropriate for several reasons, in addition to the fundamental responsibility of the states for enforcing voting rights.

Where state attorneys general have been active in advising and educating local officials about their obligation, e.g., Virginia, there has been much less non-compliance with the law than in other covered states.

Except for South Carolina and Texas, the covered states do not really have "home rule", in the sense of counties empowered independently to perform most legislative functions concerning their activities. In those states with home rule, there is a complex interaction between state laws, local laws, and local officials' application and administration of state laws. Even election laws applicable only to one or a few counties are often enacted by the state legislature at the request of the delegation from that district.[193]

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[190] Section 1 of the Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any state* on account of race, color, or previous condition of servitude." (emphasis added). In the 1965 Act Congress retained, in large measure, the state as the appropriate unit for determining coverage under the Act. Similarly, the 1965 Act provided for termination of coverage, where the entire state was covered, only by the state. This bailout formula was upheld by the Supreme Court in *South Carolina* v. *Katzenbach*, *supra*, and again in *City of Rome* v. *United States*, *supra*.

[191] 380 U.S. 89, 91 (1964).

[192] A country seeking to bail out must show that all of the subdivisions within its territory are eligible for bailout, as well. Towns and cities within counties may not bailout separately. This is a logistical limit. As a practical matter, if every political subdivision were eligible to seek separate bailout, we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits. It would be one thing for the Department and outside civil rights litigators to appear in hundreds of bailout suits. It would be quite another for them to have to face many thousands of such actions because each of the smallest political subunits could separately bail out. Few questioned the reasonableness and fairness of this cutoff in the House.

[193] Senate Hearings, Statement of Steve Suitts, pp. 4–6 Transcript at 113; Statement of Julius Chambers, p. 3; Statement of Abigail Turner, Feb. 2, 1982, p. 10.

Some covered states have histories of preempting local action by state legislation. They could do so in many areas of election law as a last resort to ensure compliance, if guidance and urging does not suffice.[194]

I. Jurisdiction of Ballot Lawsuits

Jurisdiction to hear bailout suits is limited to the District Court for the District of Columbia. The Committee believes this is necessary to provide uniform interpretation of the bailout standards, to develop experience and expertise in their application and to ensure judicial decision making free from local pressures. This is a continuation of the venue provided in current law. At present jurisdictions seeking to bail out must sue in the District of Columbia. Almost 25 jurisdictions have done so successfully. Others withdrew their applications when facts were pointed out that precluded their bailing out.[195]

In *South Carolina* v. *Katzenbach*, the Supreme Court ruled that vesting jurisdiction in the District of Columbia courts for preclearance and for bailout was an appropriate exercise of congressional authority, pursuant to Article III of the Constitution.[196]

Congress vested jurisdiction in the District of Columbia in bailout suits for several reasons. These purposes are even more important with the more complex bailout criteria added by the new bill than they were under the simple bailout mechanism of present law.

First, it promotes the development of expertise in a single court. The District of Columbia court has now heard some 25 preclearance cases and about 30 bailout cases. That litigation provides a significant base of experience on which to draw for the application of this statute. The greater familiarity will permit speedier resolution of the bailout cases.

A second purpose was to promote uniformity. Under the new bailout provision we can anticipate suits brought by jurisdictions throughout the country. Up to several hundred would be eligible to apply in 1984. There will be much less confusion and conflict over the application of this provision if all of this litigation is handled by the District of Columbia court.

The purposes of the bailout provisions would be seriously undermined if jurisdiction were vested in local district courts and the interpretations of the legal standards governing bailout applied in New York were different from those applied in Mississippi. It is not unusual for the Congress to vest exclusive jurisdiction over a matter of this nature in the District of Columbia courts for precisely these two reasons of developing expertise and promoting uniform application.

Furthermore, the legislative history of the Voting Rights Act shows that its extraordinary remedies were required because relief in voting rights cases filed in local district courts was often extremely difficult to obtain. Although that problem has abated to a significant extent, testimony before the House Subcommittee on Civil and Constitutional Rights and the Senate Subcommittee on the Constitution has demonstrated that in significant instances this is still the case. For example, the Mississippi legislative reapportionment case, *Connor* v. *Johnson*,

[194] Senate Hearings, *Id.*

[195] Court records were made by depositions in the local jurisdictions. People did not have to travel to Washington. The Justice Department sent out investigators.

[196] 383 U.S. 331–32.

went on for 14 years—with nine trips to the Supreme Court—before effective relief for voting rights denials finally was obtained.[197]

Since those who seek to provide venue for bailout suits in local district courts would change the practice under the Act for the past 17 years, the burden is on them to present substantial reasons for such a departure. None has been presented which the Committee found compelling.

An amendment to eliminate the restriction of bailout suits to the District of Columbia federal court, offered in Committee by Senator East, was defeated by a vote of 12 to 6. A similar amendment had previously been rejected on the House floor by a vote of 277 to 132.

J. Effective Date of New Bailout Provision

The new bailout criteria will replace those in existing law two years after the date of enactment of this legislation. The deferred effective date will permit an orderly transition to the new procedures. Several previous Assistant Attorneys General for Civil Rights advised the House Committee that the two year startup time is essential for the Department to prepare for such a heavy load of litigation under the new standards. This two year deferral will permit the Department, the covered jurisdictions, and local civil rights groups to review the law and to prepare for proceedings.[198]

Particularly while the Department of Justice is still reviewing several hundred redistricting submissions a year in connection with the 1980 census, the overlap between that responsibility and the immediate need to defend bailout suits would put an impossible strain on the Department's limited and decreasing resources.

On the House floor a proposal was offered to eliminate the two year waiting period for the new bailout criteria. No roll call was requested, and this change was decisively defeated on a voice vote.

K. The Bailout is Achievable

The Committee heard conflicting testimony on the issue of whether the bailout criteria in the bill are too stringent or too lenient. The bill's provisions were challenged as being too easy to satisfy by one of the most experienced organizations in the monitoring of the Voting Rights Act and its operation in the covered jurisdictions.[199]

Others, particularly Assistant Attorney General William Bradford Reynolds and Representative Hyde, suggested that the criteria were too difficult and would be too hard to achieve.

We repeat that the goal of the bailout in the Committee bill is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process. Criteria are set forth in detail in the proposed statute. Each and every requirement of the bailout is minimally necessary to measure a jurisdiction's record of non-discrimination in voting.

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[197] See *Connes v. Finch*, 431 U.S. 407 (1977) for a history of this litigation.

[198] One benefit of affording jurisdictions ample time to review their eligibility is that it will decrease the likelihood of a premature and futile declaratory judgment action being brought in response to local political pressure before a jurisdiction is entitled to bailout. It also will provide an opportunity for jurisdictions to take whatever additional constructive steps may be necessary to satisfy that aspect of the criteria.

[199] Senate Hearings, February 1, 1982, at p. 112; Steven Suitts testified: "Senator, the Council is not particularly taken, as we say down South, with this particular bailout, not because it is too stringent but because we fear it is too loose."

The Committee believes that these criteria work together as a consistent package to provide a reasonable avenue for jurisdictions to bail out of preclearance at a time appropriate for them.

A substantial number of counties may be eligible to bail out when the new procedure goes into effect. The Subcommittee Report asserts, without any factual analysis, that the bailout is illusory because it is impossible to satisfy the criteria.

Several expert witnesses testified to the contrary. Mr. Armand Derfner presented a chart compiled by the Joint Center for Political Studies. It showed a reasonable projection of 25 percent of the counties in the major covered states being eligible to file for bailout on the basis of their compliance with the objective criteria in the compromise bill.[200] No one in the House or later in the Senate ever disputed these figures.

In fact, the figures listed in the attachments to Assistant Attorney General Reynolds' Senate testimony are virtually identical to those in the Joint Center's estimate.

Since the bailout is clearly achievable, the allegations that it would permanently impose Section 5 on covered areas is without any foundation. Nevertheless, the Committee recognized that some jurisdictions have expressed concern because of the repeated inaccuracy that this measure would impose preclearance "in perpetuity." In order to reassure those jurisdictions, the bill includes a 25 year "cap" on Section 5. At that point, it will terminate unless Congress makes a determination that the special remedy is still needed.

In the interim, the bill also requires the Congress to review the operation of the law after 15 years. Preclearance would continue through the full 25 years unless Congress took some further action after the 15 vear review.

The maximum period for Section 5 coverage was set at 25 years because a shorter period would defeat the design of the bailout provision. This "cap" will be relevant only for those recalcitrant jurisdictions which have not bailed out by then. The Committee expects that most jurisdictions, and hopes that all of them, will have demonstrated compliance and will have utilized the new bailout procedures earlier.

If the duration of Section 5 were too short, then there would be no incentive for any jurisdiction to make the good record that will allow them to bail out.

For those jurisdictions which have recent violations and which will begin compiling their ten-year record of compliance now, their ten-year probation period following bailout would last until 20 years from the date of enactment of this legislation. If the maximum life of Section 5 preclearance, for even the most uncooperative jurisdictions, were limited to 15 or 20 years, such jurisdictions could look forward to getting out from under their obligation at that point without having made any efforts. Yet jurisdictions that had conscientiously begun a record of full compliance now, would still be under probation at that date.[201] Thus, to move the cap forward would be to dismantle the care-

[200] Of course, as to the constructive efforts required by Section 4(a)(4)(F), the jurisdictions "have the keys to bailout in their own pocket." They can take the necessary steps at any time during the pendency of the bailout application provided there is a record from which the court can conclude that the constructive steps have had sufficient impact on minority participation in the political process.

[201] Their probation would of course end at the expiration date of Section 5, but it would mean that the entire effort and record of compliance had gained the "complying" jurisdiction nothing for all its pains.

fully constructed bailout mechanism. Jurisdictions willing to comply with the Act should be encouraged to do so. They should not be treated as if they were in the same posture as the least cooperative jurisdictions.

Constitutionality of the Revised Bailout

Each of the criteria in the bailout provisions of the Committee bill meets the test for constitutionality: they are relevant to the continued need for coverage and are not unduly burdensome. See, *South Carolina* v. *Katzenbach*.[202] "Congress may use any rational means" to enforce the Fifteenth Amendment's prohibition on racial discrimination in voting. The principal constitutional limitation on Congress' broad powers under the Fifteenth Amendment is that Congress must act remedially, i.e., legislation under the Fifteenth Amendment must be necessary to remedy prior constitutional violations, or to prevent practices that create the "risk of purposeful discrimination." [203]

The Supreme Court has long recognized the constitutionality of the preclearance and bailout procedures contained in the Voting Rights Act of 1965. As long ago as *South Carolina* and as recently as *City of Rome* the Court has sustained these provisions. The Committee believes that the proposed revisions of the existing bailout procedures are well within the constitutional parameters set down by the Court in those cases.

In both *South Carolina* and *Rome*, the Court upheld the constitutionality of Section 5, given the extensive record of voting discrimination compiled by Congress. Against this background, the Court reasoned that Congress' decision to employ a preclearance mechanism was clearly permissible. Moreover, in *Rome* the Court specifically rejected the argument that "even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975, when Congress extended the Act for another seven years.[204]

The Court in *Rome* reviewed the detailed Congressional findings in 1975. It found "Congress' considered determination" that extension of Section 5 preclearance and other special statutory remedies was essential to counter the 95 years of pervasive voting discrimination to be "both unsurprising and unassailable." [205]

As we have explained above, the need for and the importance of Section 5 preclearance continues unabated. In our view, the hearing record compiled by the 97th Congress provides overwhelming justification for continuing Section 5 preclearance.

It is true that the decisions in *South Carolina* and *Rome* expressed the concern that Congress not permanently subject jurisdictions to the unusually stringent remedy of preclearance. The revised bailout set forth in S. 1992, was drafted with this concern in mind. The proposed procedure maintains preclearance only until a jurisdiction satisfies the achievable bailout criteria set forth in S. 1992. Since the bailout provision in S. 1992 clearly is an achievable standard, the suggestion in the Subcommittee Report that it would permanently impose Section 5

[202] *South Carolina* v. *Katzenbach*, 383 U.S. at 324.
[203] *City of Rome*, 446 U.S. at 177.
[204] 446 U.S. 180.
[205] 446 U.S. 182.

on the covered jurisdiction is without foundation, as are the constitutional arguments premised on that assertion.[206] And, in any event, the 25 year cap places a definite termination date in the law.

VIII. ASSISTANCE TO VOTERS

Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.

Clearly, the manner of providing assistance has a significant effect on the free exercise of the right to vote by such people who need assistance. Specifically, it is only natural that many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than a person of their own choice. As a result, people requiring assistance in some jurisdictions are forced to choose between casting a ballot under the adverse circumstances of not being able to choose their own assistance or forfeiting their right to vote. The Committee is concerned that some people in this situation do in fact elect to forfeit their right to vote. Others may have their actual preference overborne by the influence of those assisting them or be misled into voting for someone other than the candidate of their choice.[207]

To limit the risks of discrimination against voters in these specified groups and avoid denial or infringement of their right to vote, the Committee has concluded that they must be permitted to have the assistance of a person of their own choice. The Committee concluded that this is the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter. To do otherwise would deny these voters the same opportunity to vote enjoyed by all citizens.

The Committee has concluded that the only kind of assistance that will make fully "meaningful" the vote of the blind, disabled, or those who are unable to read or write, is to permit them to bring into the voting booth a person whom the voter trusts and who cannot intimidate him. Since blind, disabled, or illiterate voters have the right to "pull the lever of a voting machine", they have the right to do so without fear of intimidation or manipulation.

The Committee intends that voter assistance procedures, including measures to assure privacy for the voter and the secrecy of his vote be established in a manner which encourages greater participation in

[206] See pp. 54–58, 59–63.

[207] The Committee received information indicating that having assistance provided by election officials discriminates against those voters who need such aid because it infringes upon their right to a secret ballot and can discourage many from voting for fear of intimidation or lack of privacy. Letter from James Gashel, National Federation of the Blind, to Senator Metzenbaum, April 27, 1982 (made part of the record of the Committee meeting to consider S. 1992.)

our electoral process. The Committee recognizes the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters.

State provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon the facts. Thus, for example, a procedure could not deny the assistance at some stages of the voting process during which assistance was needed, nor could it provide that a person could be denied assistance solely because he could read or write his own name.

By including the blind, disabled and persons unable to read or write under this provision, the Committee does not require that each group of individuals be treated identically for purposes of voter assistance procedures. States, for example, might have reason to authorize different kinds of assistance for the blind as opposed to the illiterate. The Committee has simply concluded that, at the least, members of each group are entitled to assistance from a person of their own choice.

All states now provide some form of voting assistance for handicapped voters. The implicit requirement of the ban on literacy tests in covered jurisdictions which the 1965 Voting Rights Act imposed, is that illiterate voters in those districts may not be denied assistance at the polls.[208]

> This stultifying provision (barring assistance to illiterates) conflicts with the Voting Rights Act of 1965. The Act provides for the suspension of literacy tests in states which have used such tests as a discriminatory device to prevent Negroes from registering to vote. Like any other law, this provision implicitly carries with it all means necessary and proper to carry out effectively the purposes of the law. As Louisiana recognized for 150 years, if an illiterate is entitled to vote, he is entitled to assistance at the polls that will make his vote meaningful. We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.[209]

The 1970 temporary suspension of literacy tests nationwide, made permanent in 1975, means that a denial of assistance to illiterate voters in any jurisdiction is now in conflict with the Voting Rights Act. As an independent source of the right of illiterate voters to assistance in many cases is that it must be provided wherever such assistance is available to other groups such as the blind or disabled.[210]

Therefore, this amendment does not create a new right of the specified class of voters to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance. In fact many states already provide for assistance by a person of the voter's choice. Section

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[208] *United States* v. *Mississippi*, 256 F. Supp. 344, 349 (S.D. Miss. 1966); *see United States* v. *Louisiana*, 265 F. Supp. 703, 709 (E.D. La. 1966) aff'd mem., 386 U.S. 270 (1967).

[209] 265 F. Supp. at 708. See generally Derfner, *Discrimination and Voting*, 26 Vand. L. Rev. 523, 563–566 (1973).

[210] *Garza* v. *Smith*, 320 F. Supp. 131 (W.D. Tex. 1970), *remanded*, 450 F. 2d 790 (5th Cir. 1971), injunction granted. Civ. No. SA 70–CA–169 (W.D. Tex., Dec. 6, 1971).

4 of the bill simply extends this right to blind, disabled and illiterate citizens in all states. It is the Committee's view that this is the most effective method of providing assistance while at the same time conforming to the pattern already in use in many states.

Section 4 of the bill would not permit the voter's employer or agent of that employer to provide assistance. It would also preclude assistance by an officer or agent of the voter's union.

It should be noted, however, that this employer limitation does not apply to cases of voters who must select assistance in a small community composed largely of language minorities whose language is primarily unwritten or oral, such as those residing in an Alaskan native village of a New Mexican pueblo or reservation. To being with, many of these communities have only a very few employers. In addition, it often happens that all or most of the members of the village belong to the same regional or village native corporation; the Committee recognizes that a voter's choice of a fellow corporation member to assist in the voting booth may give the appearance of a technical violation of the employer bar. In either case, however, the committee concludes that the burden on the individual's right to choose a trustworthy assistant would be too great to justify application of the bar on employer assistance.

It should also be noted that the ban on assistance by an agent of the employer or by an agent or officer of the voter's union does not extend to assistance by a voter's co-worker, or fellow union-member.

IX. BILINGUAL ELECTIONS

The near unanimous testimony of Senate and House witnesses is that the bilingual election provisions are and should remain an integral component of the Voting Rights Act. The Committee shares this view and is unanimous in its support for continuation of bilingual elections until 1992. Enacted by Congress in 1975, these provisions, contained in Section 203, have extended the franchise to Americans of Hispanic, Indian, Asian and Eskimo descent. In 1975, Congress found that many language minority citizens "are from environments in which the dominant language is other than English", and have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language.[211]

Senate testimony revealed that there is a continuing need for bilingual elections; that they can be implemented efficiently and cost-effectively; and that they enjoy widespread bipartisan support in Congress, the Administration and the public. Witnesses who testified in support of bilingual elections included Attorney General William French Smith, Assn't Attorney General Reynolds, Archibald Cox, Arizona Governor Bruce Babbitt, Texas Governor William Clements, Vilma S. Martinez, President of the Mexican American Legal Defense and Educational Fund, and Arnold Torres, Washington Director of the League of United Latin American Citizens.

The testimony refuted allegations that bilingual elections are "excessively costly"; that they discourage non-English speaking citizens from learning English; that they threaten the ideal of the American "melting pot", and that they foster "cultural separatism." [212]

[211] S. Rep. No. 94-295, 94th Cong., 1st Sess. at pp. 24, 28.
[212] See e.g. Martinez testimony, statement, pp. 27-36.

In the House, Representative Paul McCloskey, had initially based his call for the repeal of the bilingual provision in large measure on the argument that they "cost too much." However, he withdrew this aspect of his argument when presented with information about Los Angeles County and other areas that have implemented bilingual elections in an efficient and cost-effective manner.[213] The cost of implementing bilingual elections in Los Angeles County dropped from the initial "start up" expense of $854,360, in the 1976 primary to $135,200 in the 1980 general election—the latter figure accounted for only 1.9 percent of the total general election budget for 1980. In that election, over 45,000 voters requested Spanish language materials.

In California, the cost of many elections is exceptionally high, because of the large volume of explanatory printed material which is mailed to each voter prior to election, sometimes as many as 100 pages or more. However, in order to avoid excessive printing and postage costs, it is possible to "target" bilingual assistance, as Los Angeles and San Diego Counties now have done, so that Spanish language materials will be printed only for those voters who have requested them. Using this method of targetting, bilingual election expenses in San Diego decreased from $126,000 in the 1976 general election to $54,000 in 1980. This method is recommended in DOJ guidelines regarding implementation of the bilingual provisions. (Federal Register, July 1976)

Not all county registrars target bilingual voters; nor have all of them taken steps to streamline the cost of providing bilingual election materials and increase their use by language minority citizens. As a consequence, there remain isolated counties where the implementation of bilingual elections is not cost-effective. In order to decrease costs and increase minority participation in registration and voting, the Committee suggests that local registrars can examine and adopt established methods of targetting and streamling procedures where appropriate.

Even if the costs of bilingual elections were higher, when viewed in proper perspective, the Committee believes that certain costs should be willingly incurred to make our most fundamental political rights a reality for all Americans.[214]

Also dispelled during House consideration of the Act were charges that bilingual elections fostered "cultural separatism." Roberto Mondragon, Lieutenant Governor of New Mexico, which has conducted bilingual elections since its statehood in 1912, noted that New Mexico has the highest degree of Hispanic participation and representation of any state in the country. It is also the only state in which Hispanics hold state-wide elected offices.

The availability of bilingual elections has also been significant for Asian Americans. The Chinese, one House witness noted, were not permitted to become naturalized citizens until 1943. "This historic prohibition against citizenship by Chinese Americans has had a devastating impact on many of today's elderly citizens who were denied equal

[213] House Report 97–227, p. 26.
[214] See testimony of New York Attorney General, Robert Abrams, pp. 1452–53. House hearings, 1981.

educational and socio-economic opportunities during their younger days." [215]

Similarly, American Indians were not accorded citizenship until 1924 and were not permitted to vote in federal elections until the 1960's. In some areas the percentage of adults living on Indian lands who are not fluent in English may range as high as 60–70 percent. Most of the many different Indian languages are unwritten ones. The oral assistance provisions of Section 203 are thus vitally important for these citizens.[216]

There was general agreement that, in Archibald Cox's words, "the best way to avoid a separatist movement in this country is to encourage participation in the exercise of the right to vote." He went on to say that an "electoral process without language barriers makes it plain to all that we are one Nation with one government for all the people." [217]

On the floor of the House, Majority Leader Jim Wright more philosophically: "We have never made a mistake, when we broadened the franchise . . . We have never made a mistake when we let more people vote." [218]

Witnesses before the Committee provided new survey data supporting the need for and the use already made of bilingual materials. The data indicated that elderly citizens, who are least likely to learn English late in life, are the ones most likely to need bilingual assistance.[219] This poll confirms the conclusion of a *San Diego Tribune* editorial that bilingual voting is a "measure to give older Spanish-speaking citizens the sense of full participation in our democracy. The younger members of the community are moving rapidly away from linguistic isolation." [220]

Among those who participated in the survey who are between 18 and 25, 6 out of 100 persons speak only Spanish. Among those over 65, 34 persons, or more than 33 percent, speak only Spanish. Among those with less than five years of schooling, about one-third speak only Spanish.

Twenty-three percent of all respondents received assistance from a bilingual pollworker and 24 percent used the Spanish language ballot in the 1980 election.

Finally, 32 percent said they would be less likely to vote if Spanish language assistance were not available.

These data should lay conclusively to rest allegations that bilingual elections are not needed and not of great value by those citizens for whom they were intended.

In light of the strong record of support for these provisions, the Committee recommends that they be extended for 7 years.

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[215] House Hearings, Henry Der, Executive Director, Chinese for Affirmative Action, p. 1497.

[216] Testimony of David Dunbar, General Counsel, National Congress of American Indians, House, p. 1908.

[217] Archibald Cox prepared statement, p. 19, Senate testimony.

[218] Cong. Rec., Oct. 5, 1981. p. H6997.

[219] Survey undertaken by the Mexican American Legal Defense and Educational Fund and the Southwest Voter Registration Education Project, Dec. 1981, Jan. 1982. "Bilingual Elections At Work in the Southwest." p. 96–105. Submitted as supplemental testimony of Vilma S. Martinez, March 5, 1982. Subcommittee on the Constitution, U.S. Senate. The survey consisted of personal or telephone interviews with approximately 912 U.S. citizens of Mexican descent in Los Angeles, San Antonio and Uvalde, Texas. With respect to the need for bilingual registration and voting assistance, the results of this poll suggest that significant numbers of citizens speak only Spanish and that the vast majority of them are older than 65 years.

[220] September 1, 1981.

Section 3

This section amends Section 2 to make explicit the standard for establishing a violation of Section 2 of the Act.

New Subsection 2(a) amends the current language of Section 2 to prohibit any voting qualification, prerequisite, standard, practice, or procedure which "results" in a denial or abridgement of the right to vote on account of race, color or membership in a language minority.

The subsection expresses the intent of Congress in amending Section 2 that plaintiffs do not need to prove discriminatory purpose or motive, by either direct or indirect evidence, in order to establish a violation. With this clarification, Section 2 explicitly codifies a standard different from the interpretation of the former language of Section 2 contained in the Supreme Court's *Mobile* plurality opinion,[221] i.e. the interpretation that the former language of Section 2 prohibits only purposeful discrimination.

Under Section 2, as amended, plaintiffs would continue to have the option of establishing a Section 2 violation by proving a discriminatory purpose behind the challenged practice or method. However, if plaintiff chose to establish a violation under the alternative basis now codified in the statute as the "results standard, then proof of the purpose behind the challenged practice is neither required or relevant.

New Subsection 2(b) delineates the legal analysis which the Congress intends courts to apply under the "results test." Specifically the subsection codifies the test for discriminatory result laid down by the Supreme Court in *White* v. *Regester*, and the language is taken directly from that decision. 412 U.S. 755 at 766, 769.[222] The courts are to look at the totality of the circumstances in order to determine whether the result of the challenged practice is that the political processes are equally open; that is, whether, members of a protected class have the same opportunity as others to participate in the electoral process and to elect candidates of their choice. The courts are to conduct this analysis on the basis of a variety of objective factors concerning the impact of the challenged practice and the social and political context in which it occurs.

The motivation behind the challenged practice or method is not relevant to the determination. The Committee expressly disavows any characterization of the results tests codified in this statute as including an "intent" requirement, whether or not suh a requirement might be met in a particular case by inferences drawn from the same objective factors offered to establish a discriminatory result.[223] Nor is there any need to establish a purposeful design through inferences

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[221] *Mobile* v. *Bolden*, 446 U.S. 55 (1980). For the reasons discussed in Section VI.B of this report, pp. ——, the Committee believes that the amended language of Section 2 of our bill is completely consistent with the intent of Congress when the Voting Rights Act was enacted in 1965. Unlike the *Bolden* plurality opinion, we believe that the complete legislative history of the original enactment of Section 2 shows that Congress did not mean to make discriminatory intent a requisite element of the violation. However, we fully recognize that under our Constitutional system, the Court has the ultimate authority to interpret the meaning of laws once they have been enacted. Therefore, we are now clarifying the intended scope of Section 2 to make explicit that proof of intent is not the required basis for relief.

[222] *Accord, Whitcomb v. Chavis*, 403 U.S. 124, 149–50 (1971); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973).

[223] Thus, for example, the proof of discriminatory result is not to be equated to being simply an alternative way of establishing an invidious purpose as in *Nevett* v. *Sides*, 571 F.2d 209 (1978).

from the forseeable consequences of adopting or maintaining the challenged practice.

By codifying the "results" standard articulated in *White* and its progeny, the amendment retains the repeated emphasis in those cases that there is nothing, *per se*, unlawful about at-large elections systems. Only when such systems operate, in the context of other objective factors and the totality of circumstances, to effectively deny members of a minority group the opportunity to participate equally in the process, is a violation established.

By referring to the "results" of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under Section 2 from the standard for determining whether a proposed change has a discriminatory "effect" under Section 5 of the Act.[224]

New Subsection 2(b) also replaces the so-called "disclaimer" language in the House-passed bill in order to make more clear that the amended section creates no right to proportional representation.[225] The Committee language codifies the approach used in *Whitcomb*, *White* and subsequent cases, which is that the extent to which minorities have been elected to office is only one "circumstance" among the "totality" to be considered.[226]

It expressly states that members of a minority group do not have a right to be elected in numbers equal to their proportion in the population. The disclaimer thus guarantees that the question of whether minority candidates have been successful at the polls will not be dispositive in determining whether a violation has occurred. If a violation is established traditional equitable principles will be applied by the courts in fashioning relief that completely remedies the prior dilution found to be in violation of this section.

X. SECTION-BY-SECTION ANALYSIS

Section 1

This section provides that the Act may be cited as the "Voting Rights Act Amendments of 1982."

Section 2

This section contains substantial revisions to the so-called bailout provisions of the current law. The effect of the amendments is to keep covered jurisdictions subject to the bailout in current law for two more years, at which time they may bail out by showing a 10-year record of full compliance with the law and by demonstrating positive steps to afford full opportunity for minority participation in the political process. The effect of the first amendment made by this Section is to retain the current bailout standard until August 5, 1984.

Section 2(b)

This section provides that the amendments made in S. 1992 to Section 4(a), relating to the new standards for bailout, are effective on and after August 5, 1984.

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[224] Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.

[225] The disclaimer in the legislation passed by the House simply states that a lack of proportional representation "in and of itself" does not constitute a violation.

[226] *Whitcomb*, 403 U.S. at 149; *White* 412 U.S. at 766–69; *Zimmer* 485 F. 2d at 1305.

The Committee believes the two-year waiting period is essential to allow the Justice Department sufficient time to prepare for the expected increase in bailout litigation without undermining the Department's capacity to enforce the Act.

Section 2(b) (1) and (2)

These sections provide that certain political subdivisions within full covered states may initiate a declaratory judgment action seeking to bail out independently of the state. This represents a significant expansion of current law which requires that a political subdivision in a fully covered state may not bail out and must wait until the state, as a whole bails out.

When referring to a political subdivision this amendment refers only to counties and parishes except in those rare instances in which registration is not conducted under the supervision of a county or parish. In such instances, such as independent cities in Virginia, a jurisdiction other than a county or parish may file for bailout. A city with such registration may not bailout separately.

For a state or political subdivision to qualify for bailout, all of the units of government within that state or political subdivision must meet the bailout criteria.

Lastly, for purposes of bailout, political subdivisions are defined as of the date they were covered under Section 4(b) of the Act.

This limitation is a logistical one. If the smallest of political subdivisions could bail out, the Department of Justice and private groups would have to defend thousands of bailout suits.

Section 2(b) (3) and (4)

These sections provide that to obtain a declaratory judgment of bailout, the jurisdiction must carry the burden of proving that it and all political subdivisions within its territory have met each of the bailout criteria enumerated in Section 2(b)(4), during the 10 years preceding the filing of the declaratory judgment action and during the pendency of such suit. Such a linkage concept has been approved by the Supreme Court. *City of Rome* v. *U.S.* 446 U.S. at 162–69. The Committee has decided to retain the requirement that a state cannot bail out until each of its political subdivisions can bail out, both because of the significant statutory and practical control that states exercise over their subunits and because the Fifteenth Amendment places responsibility on the states for protecting voting rights.

With respect to each of the bailout criteria, the Committee has continued existing law with respect to the burden of proof. This burden is reasonable because "the relevant facts" are "peculiarily within [the jurisdiction's] knowledge." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 332 (1966).

A ten-year period of compliance is required to assure that the jurisdiction has established a genuine record of nondiscrimination. Evidence of continuing widespread discrimination in the covered jurisdictions has led the Committee to conclude that a ten-year period is reasonably necessary to assure against the risk of perpetuating "95 years of pervasive voting discrimination" that preceded enactment of the Voting Rights Act. *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980).

Under Section 2(b)(4) of the Committee bill, the bailout standards which a jurisdiction must meet for the ten-year period will be enumerated in new subsection 4(a)(1)(A)–(F) of the Act.

New Subsection 4(a)(1)(A) [227]

A jurisdiction seeking to bail out must show that no test or device has been used within its territory for the purpose or with the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

This criterion for bailout has been selected because the use of a "test or device" is the very basis upon which initial coverage of Section 5 was determined. Moreover, this criterion will not pose a substantial hurdle as there has been a nationwide ban on "tests or devices" since 1970.

New Subsection 4(a)(1)(B)

Bailout is barred by any final judgment of voting discrimination during the previous ten years. For purposes of this section a final judgment is defined as a final decision of any court. Not included is an interlocutory decision or order. Thus, a final decision of a district court is a "final judgment" even though an appeal might be pending.

A bailout judgment will await a final judgment in any pending voting discrimination suit filed *before* the bailout suit was filed.

The need to preclude bailout if there is a substantial possibility of recent discrimination, as well as the interests of judicial economy, dictate that pending suits alleging voting discrimination be adjudiciated before a bailout suit is granted. Current law provides ample deterrence to the filing of nonmeritorious suits, as well as procedures to assure that when such suits are brought they can be disposed of quickly. See Rules 11, 56(g) Fed. R.Civ.P.; Rule 38 Fed. R.App. P.; 42 U.S.C. § 1973*l*(e).

Consent decrees resulting in an abandonment of the challenged voting practice are treated the same as final judgments as a bar to bailout. Traditionally such decrees are treated as the functional equivalent of final judgments, and the Committee does not believe that a departure from this practice is justified. The requirement that the decree must have resulted in an abandonment of the challenged voting practice addresses the concern that a consent decree might have simply been entered to avoid a nuisance suit. It would be highly unusual for a jurisdiction to agree to a change in its electoral system simply to avoid nuisance litigation.

New Subsection 4(a)(1)(C)

A jurisdiction seeking to bail out must show that no federal examiner has served in the State or political subdivision seeking to bail out.

The appointment of Federal Examiners by the Attorney General is not discretionary but rather is controlled by specific standards set forth in the Act. The Committee believes that the sending of examiners provides strong evidence of continuing voting rights violations. The record shows that jurisdictions to which examiners have been sent are those where there have been continuing voting rights abuses. There is no evidence that the sending of federal examiners has ever been unjustified.

[227] The references to "New Subsection . . ." refer to the changes which the bill will make in the present language of the Act, rather than to the Sections of the Committee bill.

The Committee believes it unwise to subject the bailout suit to relitigation of whether each assignment of federal examiners was justified. In other areas under the Voting Rights Act Congress has made certain decisions conclusive, E.g., *Briscoe* v. *Bell*, 432 U.S. 404 (1977).

New Subsection 4(a)(1)(D)

To be eligible for bail out, a State of political subdivision, and all governmental units within its territory must have complied with Section 5 of the Act. "Complied with Section 5" means that for the preceding 10 years, the jurisdiction, and all governmental units within the jurisdiction have submitted all voting law changes in a timely manner, have not implemented any election law change prior to submitting it for preclearance, or to which an objection has been entered, and have repealed all changes to which the U.S. Attorney General has objected or for which the District Court for the District of Columbia has denied a declaratory judgment.

Numerous jurisdictions have been lax with respect to timely submissions. In these cases the rights of voters under the Voting Rights Act are violated not only when the voting change is first enforced but on each occasion thereafter when it is enforced without having been submitted and precleared. This requirement for timely submissions applies even if the voting change, when eventually submitted, was not found objectionable.

The pharse "to which the Attorney General has successfully objected" means that if the Attorney General objects to a proposed change and the jurisdiction submits the same proposed change to the District Court and receives a declaratory judgment of preclearance, then such objection is not "successful". See *Beer* v. *U.S.*, 425 U.S. 130 (1976). However, if after an objection is interposed by the Attorney General, the jurisdiction seeks a declaratory judgment, by submitting a revised plan to the court, then the original objection is a "successful" one for purposes of this subsection, whatever the court's disposition of the revised plan.

Jurisdictions must repeal all legislation and other voting changes that were objected to before they are permitted to bail out so that they will not be able to enforce any such legislation once they are exempted from the Act's coverage.

The term "all governmental units" as used in this section refers to all jurisdictions within a State or political subdivision which are required to make Section 5 submissions under *U.S.* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978).

The term "preclearance" as used herein refers to the process of submitting for review to the U.S. Attorney General or to the District Court for the District of Columbia all proposed electoral changes prior to their implementation.

Lastly, it is the Committee's intent that compliance with Section 5 means that even if a Section 5 objection is ultimately withdrawn or the judgment of the District Court for the District of Columbia denying a declaratory judgment is vacated on appeal, the jurisdiction is obligated not to enforce the proposed change during the period in which the objection or declaratory judgment denial was in effect.

New Subsection (4)(a)(1)(E)

Bailout is barred if, pursuant to Section 5 of the Act, the Attorney General has interposed an objection to a submission under Section 5, or

a declaratory judgment seeking approval of a change has been denied by the District Court.

A declaratory judgment for bailout may not be issued until submissions pending pursuant to Section 5 have been resolved. If a previously entered objection is withdrawn by the Attorney General after a timely request for reconsideration of the same proposed change is made, on the basis of additional information, then the objection does not bar bailout. However, if an objection is withdrawn only after revisions have been made to the original proposed change, or on the basis of changed circumstances, then the objection does bar bailout.

The Committee rejects the notion that unjustified objections would be used to bar bailout. Attorneys General have acted carefully and in good faith before imposing objections. Even if an objection were questionable, the jurisdiction can obtain a *de novo* review in the District Court. The Justice Department frequently discusses changes prior to a submission to help jurisdictions ensure that proposals will not be objectionable.

New Subsection 4(a)(1)(F)

The general purpose of this entire section is to require covered jurisdictions, as a prerequisite to bailing out, to eliminate voting practices and methods of elections which discriminate against minority voters and to open up the electoral process to greater minority participation. Since the bailout provisions allow jurisdictions to exempt themselves completely from the coverage of the special provisions of the Act, including the preclearance requirement, the jurisdiction seeking bailout must do more than simply maintain the status quo, if the status quo discriminates against minority voters, or if the status quo continues the effects of past discrimination against minority voters.

The Committee believes that a jurisdiction seeking to bail out should meet certain objective requirements, in order to "counter the perpetuation of 95 years of pervasive voting discrimination." *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980).

There are three components of this requirement.

New Subsection 4(a)(1)(F)(i)

A jurisdiction must demonstrate to the Court that it has eliminated voting procedures or methods of election which inhibit or dilute equal process. In determining whether procedural methods "inhibit or dilute equal access," the standard to be applied is the "results" standard of the committee amendments to Section 2. The burden of proof would be on the jurisdiction seeking bailout to establish that the essential elements of its election system do not result in the denial or abridgment of the right to vote within the meaning of *White* v. *Regester*. The same showing would have to be made as to any other method or practice which the Attorney General or an intervenor alleges to fall within this subsection.

The basis for this standard is the extensive hearing record showing that discriminatory voting procedures and methods of election continue to exist throughout the covered jurisdictions.

Voting procedures encompass requirements for voter registration and the registration process, and methods of election include all aspects of the electoral process.

New Subsection 4(a)(1)(F)(ii)

A jurisdiction must demonstrate that it has engaged in constructive efforts to eliminate intimidation or harassment of persons exercising the right to vote. This requirement is not meant to imply that the prescribed conduct has occurred in all jurisdictions. But where such conduct has occurred, this requirement is deemed necessary to insure that minority citizens are not inhibited or discouraged from participating in the political process.

Intimidation and harassment of voters are especially troubling because of their long-term impact on such persons and their communities. Where such conduct has occurred, the jurisdiction seeking to bail out must take steps to assure that such conduct, whether by government officials or others, will not be repeated, including giving notice within its territory that such conduct will not be tolerated.

It should be noted that the requirement is only that the jurisdiction make good faith efforts reasonably designed to eliminate such conduct. The jurisdiction is not held absolutely liable for all acts by private citizens.

New Subsection 4(a)(1)(F)(iii)

A jurisdiction must demonstrate that it has engaged in constructive efforts to expand the opportunities for minority citizens to register and vote. The House and Senate hearing record is replete with examples of restrictive registration practices and procedures, such as restricted hours and locations for registration, dual registration practices, and discriminatory reregistration requirements, which continue to exist throughout the covered jurisdictions. A jurisdiction could meet the requirements of the subsection by offering expanded opportunities for registration through the appointment of deputy registrars who are accessible to minority citizens, offering evening and weekend registration hours, or providing postcard registration. Other examples of constructive efforts include appointment of minority citizens as deputy registrars, pollworkers, and to other positions which indicate to minority group members that they are encouraged to participate in the political process. Other conditions pertaining to the new bailout criteria are enumerated in new subsection 4(a)(2)–(8), as follows:

New Subsection 4(a)(2)

The plaintiff in the bailout suit must present objective evidence of the level of minority participation in the political process. Coverage under section 4 was triggered initially by showings of low participation and it would be anomalous to terminate coverage where no gains have been made in the levels of minority participation. Evidence of participation levels can include information concerning the outcome of elections, as well. The fact that a jurisdiction with significant minority populations has never elected any minority officials would be relevant.

A number of the covered jurisdictions already maintain records from which the evidence required by this section can be derived. The jurisdictions are not all bound to present the evidence in precisely the same form, but it is intended that the evidence be objective and reliable rather than subjective or anecdotal. This subsection does not contemplate a particular numerical level of participation as a condition to bailout. It does require that the data be submitted to help the court

determine whether the effects of prior discrimination really have been eliminated.

New Subsection 4(a)(3)

The issuance of a declaratory judgment for bailout is prohibited if there is proof that the jurisdiction or any governmental unit within its territory has engaged in voting discrimination during the 10 years preceding the judgment, unless the jurisdiction can show such violations were trivial, promptly corrected and not repeated.

It is intended that this provision reach voting discrimination for which there may be no administrative or judicial record such as could be shown to meet the requirements in the preceding paragraph 4(a)(1)(A) through (E). Such discrimination is nonetheless violative of constitutional and statutory provisions regarding the right to vote.

Any violation of constitutional or statutory voting laws protecting against voting discrimination should be presumed to be not trivial. The jurisdiction must overcome the presumption by showing that any such violations were trivial, promptly corrected, and were not repeated. For example, if a qualified minority voter has been turned away from the polling place by accident or a mistake in the jurisdiction's poll books, and the mistake was immediately corrected and not repeated, this would not bar bailout. However, if a voter or poll watcher has been attacked or beaten up at the polling place by a public official or with the participation or acquiesence of election officials, this would not be considered trivial even if corrected and not repeated.

New Subsection 4(a)(4)

The State political subdivision seeking bailout must give reasonable public notice of the commencement and any proposed settlement of the bailout suit to enable interested persons to intervene.

An aggrieved party is defined broadly to include any person who would have standing under the law. Such persons may intervene at any stage, including the appeal. The provisions of section 19e of the Act and 42 U.S.C. 1988 apply to bailout suits.

New Subsection 4(a)(5)

During the 10 years following entry of a declaratory judgment, it can be reopened upon the motion of the Attorney General or any aggrieved person alleging that conduct which would have barred bailout has occurred.

This subsection parallels the "probation" provision of existing law. The decision to reopen the judgment to hear evidence does not automatically mean that the judgment will be set aside, but if, for example, there has been a finding of discrimination against the jurisdiction or against a unit of government within its territory, or if the jurisdiction has reinstated a method of election which had been objected to previously under Section 5, the Court should set aside the bailout judgment and the jurisdiction would again be covered by section 5. An aggrieved person eligible to seek reopening of the bailout judgment need not have participated in the litigation previously, and includes any person or group of people residing in the jurisdiction. In the case of a method which would dilute the votes of minority citizens, in violation of the results standard contained in the amended section 2, the court may order the jurisdiction to remove or revise it, as the case may be, in order to avoid the declaratory judgment being set aside.

New Subsection 4(a)(6)

If no judgment has been rendered in a bailout suit within two years from the time it was filed, the chief judge of the District Court for the District of Columbia may request whatever assistance is necessary to expedite these cases.

New Subsection 4(a)(7)

This section requires the Congress to reconsider the provisions of the new bailout criteria at the end of 15 years, in order to ensure that the criteria continue to work in a fair and effective manner. However, the special provisions shall remain in effect unless the Congress amends the Act.

New Subsection 4(a)(8)

This section provides that the provisions of Section 4 will expire at the end of 25 years. If there are any jurisdictions left under the preclearance requirement at the end of this period, this preclearance obligation would terminate unless the Congress amended the Act.

Section 4

This section extends section 203 of the Voting Rights Act, as amended in 1975, 42 U.S.C. § 1973 aa–1a.

That section provides for assistance in voting to voters of certain language minority groups, in certain jurisdictions selected according to a coverage formula based on a large language minority population and a high illiteracy rate. The section is currently due to expire on August 6, 1985, this provision extends that period to August 6, 1992.

Section 5

This section adds a new section 208 to the existing law, which provides that voters who require voting assistance by reason of blindness, disability, or inability to read or write may be given assistance by a person of their own choosing, except for their employer, or employer's agent, or official or agent of their union.

XI. RECORDED VOTES IN COMMITTEE

1. Dole amendment offered in the nature of a substitute.

YEAS	NAYS
Mathias	Hatch
Laxalt	East
Dole	Denton*
Simpson	Thurmond
Grassley*	
Specter	
Biden	
Kennedy	
Byrd*	
Metzenbaum*	
DeConcini*	
Leahy*	
Baucus	
Heflin	

*Voted by proxy.

Amendment adopted by a vote of 14–4.

2. East amendment to delete voter assistance requirements for those who are unable to read or write.

YEAS	NAYS
Laxalt	Mathias
Hatch	Dole
East	Simpson
Denton	Specter
Thurmond	Biden
	Kennedy
	Byrd*
	Metzenbaum
	Leahy
	Baucus
	Heflin
	DeConcini*
	Grassley*

Amendment defeated by a vote of 13–5.

3. East amendment relating to officials or agents of a voter's union providing voter assistance.

YEAS	NAYS
Laxalt	Mathias
Hatch	Biden
Dole	Kennedy
Simpson	Metzenbaum
East	Leahy
Denton	Baucus
Specter	DeConcini*
Heflin	Byrd*
Thurmond	
Grassley*	

Amendment adopted by a vote of 10–8.

4. East amendment to replace the bailout criteria offered.

YEAS	NAYS
Laxalt	Mathias
Hatch	Dole
East	Simpson
Denton	Grassley*
Heflin	Specter
Thurmond	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Baucus

Amendment defeated by a vote of 12–6.

*Voted by proxy.

5. Amendment to prevent the existence of at-large elections from being considered as evidence of a violation of Section 2 of the Act.

YEAS	NAYS
Laxalt	Mathias
Hatch	Dole
East	Simpson
Denton	Grassley*
Thurmond	Specter
	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Leahy
	Baucus
	Heflin

Amendment defeated by a vote of 13–5.

*Voted by proxy.

6. East amendment to add sex discrimination as an activity prohibited by Section 2.

YEAS	NAYS
East	Mathias
Specter	Laxalt
	Hatch
	Dole
	Simpson
	Grassley
	Denton
	Biden
	Kennedy
	Byrd
	Metzenbaum
	DeConcini
	Leahy
	Baucus
	Heflin
	Thurmond

Amendment defeated by a vote of 16–2.

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7. East amendment to add discrimination based on religion as an activity prohibited under Section 2 of the Act.

YEAS	NAYS
East	Mathias
Specter	Laxalt
	Hatch
	Dole
	Simpson
	Grassley
	Denton
	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Leahy
	Baucus
	Heflin
	Thurmond

Amendment defeated by a vote of 16–2.

8. East amendment to change the venue prescribed under Section 5 of the Act.

YEAS	NAYS
Laxalt*	Mathias
Hatch	Dole
East	Simpson
Denton	Grassley
Heflin	Specter
Thurmond	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Leahy
	Baucus

Amendment defeated by a vote of 12–6.

9. East amendment that would have changed venue for suits brought to enforce Section 2 of the Act.

YEAS	NAYS
Laxalt*	Mathias
East	Hatch
Denton	Dole
Baucus	Simpson
Heflin	Grassley
Thurmond	Specter
	Biden
	Kennedy
	Byrd
	Metzenbaum
	DeConcini
	Leahy

*Voted by proxy.

Amendment defeated by a vote of 12–6.

10. East amendment to make Section 5 of the Act apply to every single political subdivision in the Nation.

YEAS	NAYS
East	Mathias
Denton*	Laxalt*
Specter	Hatch
Thurmond	Dole
	Simpson
	Grassley
	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Leahy
	Baucus
	Heflin

*Voted by proxy.

Amendment defeated by a vote of 14–4.

The Committee then ordered the bill to be favorably reported to the full Senate by a vote of 17–1.

XII. ESTIMATED COSTS

In accordance with Section 252(a) of the Legislative Reorganization Act (2 U.S.C. sec. 190(j), the committee estimates that there will be the added cost due to this act and adopts the cost estimate prepared by the Congressional Budget Office (CBO) as follows:

Fiscal year:	*Millions*
1982	---
1983	---
1984	---
1985	1.6
1986	1.7

On May 14, 1982, thefollowing opinion was received from the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 14, 1982.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1992, the Voting Rights Act Amendments of 1982.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1992.

2. Bill title: Voting Rights Act Amendments of 1982.

3. Bill status: As ordered reported by the Senate Committee on the Judiciary, May 14, 1982.

4. Bill purpose: S. 1992 amends the requirements that states and other political subdivisions must meet to forgo review and approval by the Attorney General of proposed changes in their voting laws and procedures. These "preclearance" provisions affect nine states and parts of thirteen others.

Under the provisions of the bill, effective August 5, 1984, any state or political jurisdiction now subject to the preclearance provisions could be released from those requirements by a declaratory judgment if, over the preceding ten years, it met certain standards set forth in the bill. S. 1992 extends for five more years the time judicial jurisdiction over preclearance declaratory judgment matters is retained, allows any aggrieved person to move that the court reopen its action, and establishes certain conditions under which the court must vacate any previous declaratory judgment. The preclearance provisions are extended for 25 years after the effective date of the enactments, with interim Congressional review after 15 years.

The bill also establishes a new test of discrimination, whereby a judge could rule that discrimination occurred if state or local government actions had the effect or result of denying or abridging the right of any citizen to vote on account of race or color. Finally, the bill extends the 1975 requirement for bilingual ballots and other voting material to 1992, and provides that voters needing it may be given assistance, subject to certain restraints.

5. Cost estimate:

	Millions
Estimated authorization level:	
Fiscal year:	
1983	-----
1984	-----
1985	$1.6
1986	1.7
1987	1.8
Estimated outlays:	
Fiscal year:	
1983	-----
1984	-----
1985	1.5
1986	1.7
1987	1.8

The costs of this bill fall within budget function 750.

6. Basis of estimate: Because no substantive change in law would occur until August 1984, no additional costs will be incurred until fiscal year 1985. CBO assumes that, beginning in fiscal year 1985, some political jurisdictions will ask the district court to release them from the preclearance requirement. For the purposes of this estimate, it was assumed that 400 jurisdictions would meet the requirements set forth in the bill by fiscal year 1985 and would request release. CBO estimates that the Department of Justice would require an additional 40 positions beginning in fiscal year 1985 to handle the cases arising from the

jurisdictions seeking release from preclearance. These are estimated to cost $1.6 million in 1985, with small increases thereafter.

The estimate of outlays is based on historical spending patterns for Justice Department activities.

7. Estimate comparison: None.

8. Previous CBO estimate: On September 14, 1981, CBO prepared an estimate on H.R. 3112, a bill to amend the Voting Rights Act of 1965 to extend the effects of certain provisions, and for other purposes, as ordered reported by the House Committee on the Judiciary, July 31, 1981. That bill was similar to S. 1992, and the estimated costs are identical.

9. Estimate prepared by: Steve Martin.

10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum,
Assistant Director for Budget Analysis).

XIII. REGULATORY IMPACT EVALUATION

In compliance with rule 29.5 of the Standing Rules of the Senate the Committee finds that no significant regulatory impact as defined by that subsection will result from the enactment of S. 1992.

XIV. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

VOTING RIGHTS ACT OF 1965

AN ACT To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States to vote on account of race or color, or in contravention of be known as the "Voting Rights Act of 1965".

TITLE I—VOTING RIGHTS

SEC. 2 [No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on acount of race or color, or in, contravention of the guarantees set forth in section 4(f)(2).]

(a) *No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).*

(b) *A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*

* * * * * * *

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [seventeen] *nineteen* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [seventeen] *nineteen* years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the

use of tests or devices have occurred anywhere in the territory of such plaintiff.

* * * * * * *

SEC. 4.[1](a) (*1*) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) *or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit*, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia [in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the nineteen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of nineteen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgements of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff] *issues a declaratory judgment under this section.* No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section *or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit*, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia [in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in

[1] The amendment made by subsection (b) of the first section of this Act became effective on August 6, 1984.

contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff] *issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—*

(A) on such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory—

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for [five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section (4)(f)(2).] *ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection.*

[If the Attorney General determines that he has no reason to believe that any such test or device has been used during the nineteen preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

[If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or arbridging the right to vote on account of race or color, or in contravention of

the guarantees set forth in section 4(f)(2) he shall consent to the entry of such judgment.]

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Curt for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.

(7) The Congress shall reconsider the provisions of this section at the end of the 15 year period following the effective date of the amendments made by this Act.

(8) The provisions of this section shall expire at the end of the 25 year period following the effective date of the amendments made by this Act.

* * * * * * *

TITLE II—SUPPLEMENTAL PROVISIONS

BILINGUAL ELECTION REQUIREMENTS

SEC. 203. (a) The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

(b) Prior to August 6, [1985] *1992*, no State or political subdivision shall provide registration or voting notices, forms, instruction, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate: *Provided*, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the statewide population of voting age citizens. For purposes of this subsection, illiteracy means the failure to complete the fifth primary grade. The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

* * * * * * *

VOTING ASSISTANCE

SEC. 208. Any voter who requires assistance to vote by reason of blindness, disability or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer, or officer or agent of the voter's union.

ADDITIONAL VIEWS OF SENATOR STROM THURMOND

I support the right to vote. I support the unhindered access by every eligible citizen to the ballot box. My vote in the Committee to report S. 1992 reflects by commitment to this ideal.

It has been my concern that the change in Section 2 of the Act might not provide enough protection against mandated systems of proportional representation. This concern is embodied in the views of Senator Hatch relative to Section 2, and I join in those views in so far as they reflect myuncertainty. However, the responses of Senator Dole to questions on that subject have given me some confidence that his amendment to Section 2 is intended to respond to the charge that proportional representation will result from this legislation.

Notwithstanding the mitigation of my concerns, relative to Section 2, through colloquies and legislative history, and despite the fact that the bail-out now contains a cap (although 25 years seems unbearably long), I find the bail-out provisions of the bill, which are identical to those passed by the House, to be objectionable and unfair. For those jurisdictions which have been covered for so long a time, some for 17 years, a reasonable bail-out is necessary. To this end, I shall seek and support improvements on the floor. It is only fair and just that those jurisdictions that have abided by the law and the Constitution for reasonable periods of time ought to be able to bail-out.

The bail-out contained in S. 1992, for the most part, inserts new criteria into bail-out. New concepts and schemes, never before faced by covered jurisdictions for bail-out purposes, have been introduced by this legislation. As a result, I foresee the generation of massive litigation to establish definitions and guidelines for bail-out. I note that the discussion of these new elements found in the report of the Subcommittee on the Constitution to the full Judiciary Committee reflect many of my concerns, and I adopt that portion as my views.

BAIL-OUT CRITERIA

Of the various proposals dealing with a release mechanism from the act, all generally tend to establish criteria which must be met before a covered jurisdiction can escape or bailout from section 5 coverage. During the course of the hearings, many witnesses cited the need for a bailout, noting that such a goal is not only desirable but appropriate.[1]

Historically, the test for bail-out has always been that for a specified number of years, the petitioning jurisdiction had not used a test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." Although the original period of coverage was for five years past 1965, voting rights legislation in 1970 and 1975 aggregated this period to seventeen years. Accord-

[1] See e.g., Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith; January 28, 1982, U.S. Representative Henry Hyde; February 1, 1982, Susan McManus, Professor, University of Houston; February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia; March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

ingly, absent congressional action, those jurisdictions originally covered in 1965 would have an opportunity after August 6, 1982, to petition the U.S. District Court for the District of Columbia for release from section 5 coverage. Successful petitions, however, would remain within the jurisdiction of the District Court for a period of five additional years.[2]

The subcommittee chose to begin its analysis of bail-out criteria with the provisions of H.R. 3112. This bill extends the present Act until 1984, and thereafter utilizes a ten-year period for assessing the proposed new bail-out criteria:

> A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action [the following elements have been satisfied]:

Thereafter, the bill sets out a series of elements, each of which is necessary in order to accomplish a successful release.

> *Element 1.*—No such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2).

The use of "no test or device" has been the sole element for the duration of the Act, and as was noted by Assistant Attorney General Reynolds a ". . . large number of jurisdictions would be able to meet that test at this stage."[3]

> *Element 2.*—No final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote.

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[2] Section 4(a) [42 U.S.C. Sec. 1973(a)]. Technically speaking, there is currently a bail-out provision of sorts in the present Act apart from the requirement that a "test or device" be avoided for a period of years. This provision in section 4(a) permits bail-out if the jurisdiction can demonstrate that the "test or device" was never utilized for a discriminatory purpose. In the 17 years of the Act, nine political subdivisions (primarily outside the South) have been released from coverage under this provision, in each case the Attorney General consenting to judgment. No bail-out petition has ever prevailed as a result of full-fledged litigation. Political subdivisions which could not demonstrate that a "test or device" was never utilized for a discriminatory manner prior to 1965 have not been able to bail-out since then. Cf. *Commonwealth of Virginia* v. *United States*, 386 F. Supp. 1316 (1974), affirmed 420 U.S. 901 (1975) (State of Virginia could not bail-out despite showing that "test or device" never used for discriminatory purpose because history of dual school system must have affected voting practices of black citizens.)

[3] Senate Hearings, Marh 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

This section basically establishes three types of bars to bail-out: judicial findings of discrimination concerning the right to vote; consent decrees entered into by which voting practices have been abandoned; and pending actions alleging denials of the right to vote.

A violation of the "final judgment" aspect would obviously constitute strong evidence that the jurisdiction has not abided by the principles upon which the act is founded and has not acted in good faith. According to Assistant Attorney General Reynolds, some 17 jurisdictions would be precluded from bail-out solely as a result of this factor, although he does not view it as being "an onerous requirement." [4]

With regard to the "consent decree" ban, the subcommittee believes that to preclude bail-out for a jurisdiction, solely because it has entered into a consent decree, settlement, or agreement resulting in any abandonment of a challenged voting practice *without more* is inconsistent with established practices and prudent legal principles. It is sound public policy that litigation should be avoided where possible; yet, the inclusion of consent decrees as a bar to bail-out can only engender prolonged litigation that will only detract from the long-term goals of the act. As Assistant Attorney General Reynolds stated,

> . . . clearly the preference is to settle cases and to try to obtain consent decrees and that is a way to resolve these litigations if we can. [Element 2] seems to me to sound like it might be a disincentive to jurisdictions to enter that kind of arrangement.[5]

The bar relating to pendency of actions alleging denials of the right to vote is also of concern to the subcommittee. Clearly, litigious parties could preclude a jurisdiction from a bail-out without any local control whatsoever. Moreover, this provision ignores the existing "probationary" period after bail-out.

> *Element 3.*—No Federal examiners under this Act have been assigned to such State or political subdivision.

This element would preclude bail-out if, during the previous ten-year period, either the Attorney General or a Court, had ordered the appointment of Federal examiners. Inasmuch as the use of Federal examiners entails, "displacing the discretionary functions of local voter registration officials," [6] it is by its very nature an extraordinary use of power beyond local control. There is no appeal nor review of the decision of the Attorney General. Moreover, the subcommittee must agree with Assistant Attorney General Reynolds in his assessment that it is unclear what this requirement is designed to address.[7]

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[4] Id.
[5] Id.
[6] Id.
[7] Id. Reynolds observed: "Federal examiners are assigned to jurisdictions, in connection with the registration process and listing eligible voters. If that is all it pertains to, I think there are a limited number of counties that would be affected. But, on the other hand, also Federal examiners are assigned to different countries in conjunction with sending in several of the Federal observers on request to observe different elections. If the assignment of Federal examiners for that purpose were to be included as an element which would prevent bail out, there would be a large number of counties under that particular requirement and it is not clear from the language or the House report exactly what is intended there."

The subcommittee acknowledges that in the years immediately after the 1965 Act, the use of examiners for registration purposes was successful. However, since 1975, examiners certified by the Attorney General have been utilized to list voters in only two countries.[8]

It should be noted that since August 1975, the Attorney General, however, has certified 32 countries as "examiner countries," [9] but this has been necessary in order simply to provide Federal observers, for observers may be directed only to countries in which there are examiners serving.[10]

The subcommittee believes that this element is totally beyond the control of the covered jurisdictions and could serve to frustrate any incentive to bail-out. This is especially true when, as noted, the assignment of examiners could be made only to further another administrative goal—the appointment of observers to monitor elections—which does not even imply voting irregularities.

> *Element 4.*—Such State or political subdivision and all governmental units within its territory have compiled with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment.

This requirement would bar bail-out if any voting law, practices, or procedure were implemented in the ten-year period without preclearance. Needless to say, the subcommittee recognizes the necessity of covered jurisdictions' complying with preclearance. Yet, it is conceivable that, inasmuch as the bail-out of the greater jurisdiction is tied to the lesser, some minor change could well have been instituted without preclearance. Moving the office of the county registrar from one floor to another might be an example. Nevertheless, such an omission would preclude the county as well as the state from bail-out. As an attorney with the Voting Section of the Justice Department has noted:

> Complete compliance with the preclearance requirement is practically imposible in two respects.
>
> First, no matter how many changes an official submits to the Attorney General, a student of section 5 can always find another change that has not been submitted. For example, a probate judge always submits changes in the location of polling places, but he neglects to submit the rearrangement of tables and booths at one polling place.
>
> Second, no matter how well an election administrator plans in advance of an election, there will always be changes that must be implemented before they can be precleared. For example, a polling place burns down the night before the election.[11]

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[8] Id.
[9] Id.
[10] Id.
[11] David H. Hunter, "Section 5 of the Voting Rights of 1965 Problems and Possibilities," prepared remarks for delivery at the Annual Meeting of the American Political Science Association (1980).

The subcommittee feels that such an action should absolutely preclude bail-out and, this requirement should not be so stringent as to foreclose bail-out for inadvertence.

> *Element 5.*—The Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending.

This element would bar bail-out if there has been any objection to a submission for preclearance. In the practice of section 5 pre-clearance, it is common for the Attorney General to interpose an objection to a voting change simply because there is not enough information on hand for the affirmative decision to be made that the proposal "does not have the purpose and will not have the effect" of discrimination in voting. Accordingly, an objection by the Attorney General does not per se indicate bad faith on the part of the submitting jurisdiction. Moreover, it is not uncommon for an objection to be withdrawn.[12] Assistant Attorney General Reynolds noted that of the 695 objections that had been interposed:

> Some are far more important but this [section] does not differentiate.[13]

The subcommittee acknowledges that the "no objection" specification is founded upon a general basis of assuring compliance but notes that the inability to examine the history of a covered jurisdiction's submissions might preclude bail-out due to a trivial proposed change or one that was abandoned.

> *Element 6.*—Such State or political subdivision and all governmental units within its territory—
>
> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
>
> (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and
>
> (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

The criteria of this section would require a jurisdiction seeking bail-out to prove that it and all of its political subdivisions have eliminated methods which "dilute equal access" to the electoral process, have engaged in "constructive efforts" to end intimidation and harassment of persons "exercising rights protected" under the Act, and have engaged in "other constructive efforts" in registration and voting for "every" voting age person and in appointing minorities to election posts. It is totally unclear what a "constructive effort" would be in any of these

[13] See, e.g., Senate Hearings, January 27, 1982. Attorney General of the United States William French Smith.
[12] See supra note 198.

regards although it is difficult for this subcommittee to believe that this term is intended to be employed as anything other than a vehicle to promote "affirmative action" principles of civil rights of the voting process.

As Assistant Attorney General Reynolds noted, this element, "would introduce a whole new feature that had not been in the Act at the time these jurisdictions were covered and require an additional element of proof other than simply requiring a 10-year period of compliance with the Act." [14] This section, indeed, raises new questions regarding bail-out criteria not only as to the substantive requirements but also as to proof.

The Assistant Attorney General indicated his concern when he suggested that "what one means by inhibit or dilute . . . would be subject to a great deal of litigation." [15] He further expressed his apprehension as to the constructive efforts requirements:

> This is a requirement which does go well beyond existing law. It is also well to remember in terms of the bail-out that the House bill calls for counties to show not only that *they* can meet these requirements but also *all* political sub-units within the counties and therefore you are talking, for bail-out purposes, about mammoth litigation that will demonstrate that "constructive efforts" have been made by all of these political subdivisions within the county as well as the county and that they have done whatever is necessary to insure there is no inhibition or dilution of minority vote.[16]

The subcommittee believes that the introduction of these new elements will not aid in overcoming past discrimination even if they can be interpreted. The subcommittee does believe that they will generate considerable litigation of an uncertain outcome. A reasonable bail-out is the goal of the subcommittee, and when this element is weighed with that goal, the subcommittee must resolve that such reasonableness is lost. It agrees with Assistant Attorney General Reynolds' comment on the obvious results of such an enactment:

> It goes beyond determining a violation of the Act or the Constitution and would require in each bail-out suit full-blown litigation as to whether or not the conduct of the methods of election had either a purpose or effect of . . . discouraging minority participation. That is a very complex kind of litigation to go through in a bail-out.[17]

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[14] Id.
[15] Id.
[16] Id.
[17] Id.

ADDITIONAL VIEWS OF SENATOR ORRIN G. HATCH OF UTAH

Whatever my difficulties with the proposed amendments to the Voting Rights Act—and they are considerable—I have supported final passage of the immediate measure. I have done so because I believe that the basic Voting Rights Act has made an immeasurable contribution toward ensuring for all American citizens regardless of race or color, the most fundamental guarantees of the Fifteenth Amendment to the Constitution. It has effectively secured for increasing numbers of citizens the most fundamental of civil rights in a free society—the right to participate in the selection of one's elected representatives.

Having said that, I can merely repeat what I have consistently said during the debate on the proposed amendments to section 2 of the Voting Rights Act: these amendments, in my view, will effect an incalculable transformation in the purposes and objectives of the Voting Rights Act. Their impact may, over the long run, be as profound—from both a constitutional and a public policy perspective—as that of any single piece of legislation in the history of the nation. There is no doubt, in my mind, that this legislation will come eventually to be viewed as a watershed measure, of far greater importance than ever the original Voting Rights Act—and of a far less salutory character.

The objectives of these amendments are vastly different than those of the original Act. In place of the traditional focus upon equal *access* to registration and the ballot, the amendments would focus upon equal *outcome* in the electoral process. Instead of aiming ultimately at the nonconsideration of race in the electoral process as did the original Act, the amendments would make race the over-riding factor in public decisions in this area. Instead of directing its protections toward the individual citizen as did the original Act—and as does the Constitution—the amendments would make racial and ethnic *groups* the basic unit of protection. Instead of reinforcing the great constitutional principle of equal protection as did the original Act, the amendments would substitute a totally alien principle of equal results.

I will not elaborate further at this point upon my fundamental concerns with either the amendments to section 2 or to section 5 (relating to bail-out from preclearance by covered jurisdictions) because I am content to incorporate in their entirety the views recently expressed by he Subcommittee on the Constitution on which I serve as Chairman. Following nine extensive days of hearings on the Voting Rights Act, the subcommittee voted to recommend a simple ten-year extension of the current Act. These recommendations were rejected by the full Judiciary Committee and the provisions of S. 1992 (identical to the House-approved measure) were substituted with an amendment offered by the Senator from Kansas (Mr. Dole). Despite this

amendment, I believe that the subcommittee's analysis of the House measure remains a valid and accurate one for the immediate measure.

Because it has been characterized by some as a "compromise", however, I would like to add some additional remarks on this amendment. In what seems to be the euphoria generated by the proposed "compromise", virtually ensuring the swift enactment of this measure, I must reluctantly state that I believe that the Emperor has no clothes. The proposed compromise is not a compromise at all; its impact is not likely to be one whit different than the unamended House measure.[1] As much as it is tempting to embrace this language and claim a partial victory in my own efforts to overturn the House legislation, I cannot in good conscience do this. As Pyrrhus said many centuries ago, "Another such victory over the Romans and we are undone." Those who have shared, in any respect, my concerns about the dangers of the new results test may look appreciatively upon the political "out" being afforded us by the present compromise; I would hope, however, that none would delude themselves into believing that it represents anything more substantial than that.

SECTION 2 "COMPROMISE"

The proposed amendment to section 2 contains two provisions. The first provision is identical to the present House amendment to section 2 discussed in the accompanying subcommittee report. It reads,

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement to the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

For all of the reasons outlined in the subcommittee report. I believe this provision to be dangerously misconceived.[2]

The question then is whether or not the second provision—a new disclaimer of proportional representation—would mitigate any of these difficulties and improve upon the House disclaimer provision. It reads,

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which

[1] In this view, I am joined by unexpected allies. See, e.g., Washington Post, May 8, 1982, pg. D-1 (Joseph Rauh of the Leadership Conference on Civil Rights, "It was no compromise at all. We got everything we wanted." See also Washington Post, May 21, 1982, pg. 78; Editorial, Chicago Tribune, May 12, 1982; Human Events, May 15, 1982, pg. 3; Wall Street Journal, May 5, 1982. See also Committee Report, ". . . the Committee adopted substitute language which is faithful to the original intent of the section 2 amendment as passed in the House and included in S. 1992, as introduced . . .".

[2] See especially section VI of the subcommittee report.

> may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This new disclaimer, in my view, will be little different in effect from the purported disclaimer in the House measure discussed in the subcommittee report.[3] Both provisions fail to overcome the clear and inevitable mandate for proportional representation established in subsection (a); any differences between the House and Senate disclaimers provisions are largely cosmetic.

I will focus very briefly on the difference in language between these provisions and then rest upon the analysis in the subcommittee report as an expression of my views.

The "compromise" disclaimer refers to violations being established on the basis of the "totality of circumstances". This, I gather, is supposed to be helpful language. It is not. There is little question that, under either a results or an intent test, a court would look to the "totality of circumstances". The difference is that under the intent standard, unlike under the results standard, there is some ultimate core value against which to evaluate this "totality". Under the intent standard, the totality of evidence is placed before the court which must ultimately ask itself whether or not such evidence raises an inference of intent or purpose to discriminate. Under the results standard, there is no comparable and workable threshold question for the court. As one witness observed during subcommittee hearings.

> Under the results test, once you have aggregated out those factors: what do you have? Where are you? You know it is the old thing we do in law school: you balance and you balance, but ultimately how do you balance? What is the core value? [4]

There is no core value under the results test other than election results. There is no core value that can lead anywhere other than toward proportional representation by race and ethnic group. There is no ultimate or threshold question that a court must ask under the results test that will lead in any other direction. In short, it is not the *scope* of the evidence—— "totality of circumstances" or otherwise—— that is at issue in this debate, but rather the *standard* of evidence, the test or criteria by which such evidence is assessed and evaluated.

In this regard, it is instructive to recall the Supreme Court's summary dismissal of the argument of the dissent by Justice Marshall in *City of Mobile* that proportional representation was not the object of the results test and that other factors would have to be identified as well. The Court stated,

> The dissenting opinion seeks to disclaim [the proportional representation] description of its theory by suggestion that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical or social factors" indicating that the group in question is without political influence . . . Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled

[3] See section VI(b) of the subcommittee report.
[4] Senate Hearings, February 11, 1982, Professor James Blumstein, Vanderbilt University School of Law.

> manner, exclude the claims of any discrete political group that happens for whatever reasons, to elect fewer of its candidates than arithmetic indicates it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the "inequitable distribution of political influence." [5]

The "compromise" provision also purports to establish an explicit prohibition upon subsection (a) giving rise to any right to proportional representation. This is not quite the case. Most pointedly, perhaps, there is nothing in the provision that addresses the issue of proportional represenation as a *remedy*.

There is little doubt that many proponents of the results test, in fact, are adamantly determined not to preclude the use of proportional representation as a basis for fashioning remedies for violations of section 2.[6]

More fundamentally, however, the purported "disclaimer" language in the amended section 2 is illusory for other reasons as a protection against proportional representation. It states,

> . . . nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

It is illusory because the precise "right" involved in the new section 2 is not to proportional representation *per se* but to political processes that are "equally open to participation by members of a class of citizens protected by subsection (a)." The problem, in short, is that *this* right is one that can be intelligently defined only in terms that partake largely of proportional representation. This specific right—political processes "equally open to participation"—is one violated where there is a lack of proportional representation *plus* the existence of what have been referred to as "objective factors of discrimination".[7] Such factors are described in greater detail in the subcommittee report,[8] but the most significant of these factors is clearly the at-large electoral system. The at-large system is viewed by some in the civil rights community as an "objective factor of discrimination" because they believe that it serves as a "barrier" to minority electoral participation.

Under the results test, the absence of proportional representation *plus* the existence of one or more "objective factors of discrimination", such as an at-large system of government, would constitute a section 2 violation. In a technical sense, it would not be the lack of proportional representation in and of itself that would consummate the violation but rather the lack of proportional representation in combination with the so-called objective "barrier" to minority participation. It would be

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[5] *City of Mobile* v. *Bolden*, 446 U.S. 75 fn. 22.

[6] The reluctance of proponents of the compromise to explicitly reject proportional representation as a remedy raises concern, in particular, because of the statements of individuals such as Rolando Rios, Legal Director, Southwest Voter Education Project. He describes: "two stages of litigation, that is, the proving your case part and then the remedy part . . . once the factors in *Zimmer* and *White* have been established then the courts do require you go to single-member districts but that is at the remedy stage." Senate Hearings, February 4, 1982. See also the exchange between Senator Dole and myself on this matter. Executive session, Senate Committee on Judiciary, May 4, 1982. See also Berns, Voting Rights and Wrongs, Commentary, 31, 35 (March 1982).

[7] For a brief introduction to the concept of "objective factors of discrimination", see House Rpt. No. 97–227 at 30; Voters Education Project, "Barriers to Effective Participation in Electoral Politics" (March 1981).

[8] See section VI(b) of the subcommittee report.

largely irrelevant that there was no discriminatory motive behind the at-large system, for example, or that there were legitimate, non-discriminatory reasons for its establishment or maintenance.

Among just a few additional "objective factors of discrimination" or "barriers" to minority participation would be laws cancelling registration for failure to vote, residency requirements, special ballot requirements for independent or third-party candidates, staggered terms of office, anti-single shot voting requirements, evidence of racial bloc voting, a history of English-only ballots, numbered electoral posts, majority vote requirements, and so forth. Each of these factors, when they exist within a governmental system lacking proportional representation may allegedly *explain* the lack of proportional representation. In my view, the results test leads inexorably to proportional representation because it is the absence of proportional representation that *triggers* the search for the "objective factors of discrimination in the first place. The theory of the results test, again, is that such factors allegedly explain why such an absence of proportional representation exists. Given the virtually unlimited array of such "objective factors", it is difficult to imagine any community (with or without proportional representation) that would not contain at least several such factors.[9] In practice, the results test, with or without the requirement that "objective factors of discrimination" be identified, is effectively indistinguishable from a pure test of proportional representation.

The root problem with the amended section 2 then is not with an inadequately strong disclaimer (although the present disclaimer is irrelevant and misleading); the root problem is with the results test itself. No disclaimer, however strong—and the immediate disclaimer is not very strong, in any event, because of its failure to address proportional representation as a *remedy*—can overcome the inexorable and inevitable thrust of a results test, indeed of any test for uncovering "discrimination" other than an intent test.[10] If the concept of discrimi-

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[9] This is especially true when one recognizes that the operative premises of many proponents of the results test is that proportional representation by race or ethnicity ought to be the natural state of electoral affairs and that deviations from this norm are necessarily attributable to some discriminatory policy or procedure. When such discrimination is not readily apparent, it is generally assumed that it has simply taken a more subtle form. Given the lack of proportional representation, this theory effectively requires that some otherwise race-neutral or ethnic-neutral policy or procedure be identified as the force responsible for its absence. In other words, to use a favorite term of results proponents, there is no "objective" way to determine whether or not a potential "objective factor of discrimination" is, in fact, responsible for discrimination other than to ascertain whether or not there is proportional representation. If there is not proportional representation, there is no principled basis, under the results test, for demonstrating that any given "objective factor of discrimination" was not responsible. To capture a flavor of the true breadth of how these "objective factorss" may work, it is instructive to note the statement in the Committee Report, "The courts have recognized that disproportionate educational, employment income level, and living conditions arising from past discrimination tend to depress minority political participation . . . Where these conditions are shown and where the level of black participation in politics is depressed, plaintiffs need not proved any further causal nexus between their disparate socio-economic status and the depressed level of political participation."

[10] Since the publication of the subcommittee report, the case against the intent test as an "impossible" one (see section VI(a) of the report) has been further undermined by three Federal court decisions all finding Fifteenth Amendment and section 2 violations. See, *Bolden* v. *Mobile*, Civ. Action No. 75–297–P (S. Dist. Ala. 1982); *Brown* v. *Board of School Commissioners*, Civ. Action No. 75–298–P (S. Dist. Ala. 1982) (both decisions on remand from U.S. Supreme Court following *City of Mobile* decision); *Perkins* v. *City of West Helena*, No. 81–1516 (8th Cir. 1982). Critics of the intent test are now more likely to call it an "unacceptably difficult" test rather than an "impossible" one as they have formerly done. The *West Helena* case also makes clear that it is not necessary to establish that an intent to discriminate existed when the alleged discriminatory law or procedure was originally established, but that such an action is in violation of the Fifteenth Amendment or section 2, whether or not there was a discriminatory purpose in its establishment, if there was a discriminatory purpose behind its *maintenance* at some later period in time.

nation is going to be divorced entirely from the concept of wrongful motivation, then we are no longer referring to what has traditionally been viewed as discrimination; we are referring then simply to the notion of disparate impact. Disparate impact can ultimately be defined only in terms that are effectively indistinguishable from those of proportional representation. Disparate impact is *not* the equivalent of discrimination.

The attempt in the "compromise" to define the results test as one focused upon political processes that are not "equally open to participation" is fine rhetoric, but has been identified by the Supreme Court in *City of Mobile* for what it is at heart. The Court observed in response to a similar description of the results test by Justice Marshall in dissent,

> The dissenting opinion would discard fixed principles [of law] in favor of a judicial inventiveness that would go far toward making this Court a "super-legislature".[11]

In short, the concept of a process "equally open to participation" brings to the fore what is perhaps the major defect of the results test. To the extent that it leads anywhere other than to pure proportional representation (and I do not believe that it does), the test provides absolutely no intelligible guidance to courts in determining whether or not a section 2 violation has been established or to communities in determining whether or not their electoral structures and policies are in conformity with the law.

What *is* an "equally open" political process? How can it be identified in terms other than statistical or results-oriented analysis? Under what circumstances is an "objective factor of discrimination", such as an at-large system, a barrier to such an "open" process and when is it not? What would a totally "open" political process look like? How would a community effectively overcome evidence that their elected representative bodies lacked proportional representation?

In my view, these questions can only be answered in terms either of straight proportional representation analysis or in terms that totally substitute for the rule of law an arbitrary case-by-case rule of individual judges. As Justice Stevens noted in his concurring opinion in *City of Mobile*,

> The results standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage.[12]

On the opening day of hearings, I raised several factual situations with my colleagues on the Committee: relating to Boston, Massachu-

[11] 446 U.S. at 76. The Committee Report argues that the compromise language is designed to reflect *White* v. *Regester*, 412 U.S. 755 (1973). This is highly misleading not simply because such language totally removes *White* from its intent moorings, see section VI(a) of the subcommittee report, but is is not even a faithful reflection of the full test expressed in *White*. The express requirement of *White*, for example, that there be "invidious" discrimination is avoided like the plague in both the statutory and report language of the compromise. 412 U.S. at 755, 764, 765, 766, 767. The only place in *White* where the term "results" figures prominently is in the statement taken from the lower court's opinion that Mexican-Americans in the defendant-county has long "suffered from, and continues to suffer from, the *results* and *effects* of *invidious* discriminations and treatment in the fields of education, employment, economics, health, politics, and others." 412 U.S. at 768. If anything, the use of the results concept in this context would seem to clarify that the "invidious" requirement is indistinguishable from a requirement of intent or purpose.

[12] 446 U.S. at 90 (J. Stevens concurring).

setts; Cincinnati, Ohio; and Baltimore, Maryland. I asked repeatedly how, given the circumstances in these communities, could a mayor or councilman there assure themselves that a section 2 violation could not be established. I have yet to hear an answer offering the slightest bit of guidance.[13] Each of these communities lacks proportional representation, each has erected a so-called "barrier" to minority participation in the form of an at-large council system, and each possesses additional "objective factors of discrimination" such as some history of *de facto* school segregation. There are thousands of other communities across the nation in similar circumstances as well.

I reiterate my question: how does a community, and how does a court, know what is right and wrong under the results standard? How do they know enough to be able to comply with the law? How do they know which laws and procedures are valid, and under what circumstances, and which are invalid? How do we avoid having "discrimination" boil down either to an absence of proportional representation or, in the words of one witness, "I may not be able to define it, but I know it when I see it." ?[14]

There are other objections to the proposed section 2 "compromise", but most are discussed thoroughly in the subcommittee report. I would note, however, that in one important respect the provision is even more objectionable than the House provision. It refers expressly to the "right" of racial and selected ethnic groups to "elect representatives of their choice". This is little more than a euphemistic reference to the idea of a right in such groups to the establishment of safe and secure political ghettoes so that they can be assured of some measure of proportional representation. In this regard, I note the recent statement of Georgia State Senator Julian Bond with reference to a redistricting proposal in that State,

> I want this cohesive black community to have an opportunity to elect a candidate *of their choice*. White people see nothing wrong with having a 95% white district. Why can't we have a 69% black district?[15]

That ultimately is what this so-called right to "elect candidates of one's choice" amounts to— the right to have establihed racially homogenous districts to ensure proportional representation through the

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[13] The Committee Report quotes from a tangentially relevant Justice Department study and assures us that Cincinnati, having been investigated in the context of vote dilution claims, is not in violation of the law. Apart from the fact that such study far predated the development of either the House or Senate language, it begs the basic question of *why* Cincinnati or any other community is not in violation of the law. Apart from case-by-case judicial determinations (or in this case, case-by-case Justice Department investigations), is there any way that a community can conduct its electoral and governmental affairs to ensure that such determinations or investigations will not find them in violation? Despite the rhetoric about the "totality of circumstances", I do not see any principled way in which we can avoid the tendency under the new results test of requiring increasingly small numbers of "objective factors of discrimination" (along with the lack of proportional representation) to establish a violation.

[14] Senate Hearings, January 27, 1982, Benjamin Hooks, Executive Director, Leadership Conference on Civil Rights. Although proponents of the results test like to describe it as an "objective" test, and describe it in the Committee Report as a "clear and straight forward test", there is no serious explanation in the Report as far as how it is to be applied. The most telling comments in the Committee Report are that the test is to be deciphered in terms of "the Court's overall judgment". Providing equal direction to communities attempting to understand the workings of the test are comments that the courts are to consider, *inter alia*, "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequesite to voting, or standard, practice, or procedure is *tenuous*."

[15] New York Times, May 3, 1982, pg. B–11.

election of specific numbers of Black, Hispanic, Indian, Aleutian, and Asian-American officeholders.[16]

Perhaps most importantly, the proposed "compromise" suffers from the defects of the House provision in that it attempts statutorily to overturn the Supreme Court's decision in *City of Mobile* interpreting the Fifteenth Amendment. It is altogether as unconstitutional, in my view, as the unamended House language.[17] Under our system of government, the Congress simply cannot overturn a constitutional decision of the Supreme Court through a mere statute. The Court has held that the Fifteenth Amendment requires a demonstration of intentional or purposeful discrimination. To the extent that the Voting Rights Act generally and section 2 specifically are predicated upon this Amendment—and they are—there is no authority within Congress to reinterpret its requirements and to impose greater restrictions upon the States in the conduct of their own affairs.[18] There is no power within Congress to act outside the boundaries of the Fifteenth Amendment, as interpreted by the Court, at least so long as the Federal government remains a government of delegated powers.

SECTION 5 "COMPROMISE"

The sum of the "compromise" with respect to the establishment of bail-out procedures consists of a twenty-five year extension of the preclearance requirement rather than an in-perpetuity extension.[19] No changes were made in the substantive bail-out criteria which remain unreasonable and largely unattainable ones, in my view. Because they are not likely to be satisfied by more than a handful of isolated communities (largely outside the South), I continue to believe that a simple ten-year extension of the Act, including its preclearance provi-

[16] Senator Mathias has observed that the common interest of intent proponents is that they wish to create a "homogenous" Republican party, New York, Times, April 27, 1982. With all due respect to my colleague, I believe that he (and many other proponents of the results test) err in confusing the concept of minority representation with minority influence. See the discussion generally in the subcommittee report at sections VI(c). If, in fact, I were interested in an "homogenous" Republican party—which I am not—I would probably be delighted with the opportunity to have created tidy and compact districts in which minority groups were concentrated. That, in my view, is the inevitable effect of the new test. I would be delighted to concede to minority candidates these few districts and be able to concentrate the attentions of my party solely upon the remaining districts. I would be delighted that I would not have to begin my political calculations in each district with the disadvantage of minority group members disproportionately inclined to vote for my opposition. Whatever the intent of proponents of the results test, it will be *their* results test that will lead to homogenous districts and homogenous" parties, not the intent test.

[17] See generally section VIII(b) of the subcommittee report. For a truly outrageous explanation of the Committee's rationale for determining that the immediate measure is necessary to enforce the substantive provisions of the Fourteenth and Fifteenth Amendments, note the comments of the Committee Report, "The Committee has concluded that to enforce fully the Fourteenth and Fifteenth Amendments, it is necessary that section 2 ban election procedures and practices which result in a denial or abridgement of the right to vote. In reaching this conclusion, we find (1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected, and undeterred, unless the results test proposed under section 2 is adopted; and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." To say that this rationale has been constructed out of whole cloth is to elevate it to an undeservedly high plateau.

[18] The Fourteenth Amendment which is also authority for section 2 to the extent that it covers "language minorities" also requires proof of purposeful discrimination. *Mobile* v. *Bolden*, 446 U.S. at 66–7; *Washington* v. *Davis*, 426 U.S. at 240.

[19] The compromise also permits Congress to "reconsider" the proposed new bail-out criteria after fifteen years, section 4(a)(7). This is nothing more than what Congress is already able to do fifteen years from now or at any point prior to that. It adds nothing substantive to the law.

sions, would have offered a more satisfactory approach.[20] As with section 2, I wish to incorporate in their entirety the views expressed in the subcommittee report with respect to sections 4 and 5.[21]

Indeed, it fairly clear that the twenty-five year "concession" was something that proponents of the House legislation might have done on their own because of their (understandable) concern about the constitutionality of the in-perpetuity extension. In my view, however, the amended provision is as unconstitutional as the House provision for all of the reasons stated in the subcommittee report.[22]

The constitutionality of sections 4 and 5 rest upon these sections establishing a temporary and exceptional remedy for problems of an exceptional character. While an in-perpetuity extension would clearly violate this understanding on its face, it is disingenuous to suggest that any extension for a time-certain, however long that period be, somehow avoids this difficulty. The reality is that a twenty-five year extension of preclearance represents a period five times longer than that established in 1965—a time at which minority registration and voting rates in most covered States were a miniscule fraction of what they are today. It represents an extension far exceeding in magnitude any earlier extension (by three and a half times) at precisely that period in time when it is becoming difficult to distinguish electoral conditions in the covered jurisdictions from those in non-covered jurisdictions.[23] If the proposed bail-out is not ascertained to be a "reasonable" one, affording some realistic opportunities for escape from preclearance for more than an isolated number of jurisdictions, I do not see how the reduction of the extension from in-perpetuity to twenty-five years "saves" the amended sections 4 or 5. The twenty-five year period is totally disproportionate to any reasonable findings of voting discrimination still existing within the covered jurisdictions, as a result of either the Senate or House hearings.

CONCLUSION

The changes that will be wrought by the amended Voting Rights Act—particularly the amendments to section 2—will not emerge overnight. They will not be felt fully this year, or next year, or during the remaining term of any Member of this body. Over a period of years, however, perhaps only over a period of decades, the proposed amend-

[20] Although I do not expect more than a handful of jurisdictions to bail-out for many years under the new criteria, it should be emphasized that the critical importance of the bail-out provisions to the Voting Rights Act is sharply reduced by the proposed changes in section 2. The same extraordinary standards that heretofore have only applied to *covered* jurisdictions and only with respect to *changes* in laws or procedures will now be applicable to *all* jurisdictions throughout the country and to *both* changes in law or procedure and pre-existing law or procedure. The immediate measure marks the beginning of the decline in long-term importance for section 5 and the beginning of the ascendancy of section 2.

[21] See especially section VII of the subcommittee report. While the Committee Report provides an innovative and creative interpretation of many of the proposed bail-out criteria, I do not believe that it squares with reality in at least several important instances. See, e.g., "No one in the House or later in the Senate ever disputed these figures [i.e. 25 percent of the counties in major covered States being eligible for bailout under criteria in legislation]. Cf., e.g., Senate Hearings, March 1, 1982, Assistant Attorney General of the United States for Civil Rights William Bradford Reynolds; January 27, 1982, Attorney General William French Smith. See also, jurisdictions would be barred from bail-out if they have "enacted changes which were discriminatory and, therefore, objectionable under section 5." In fact, there is absolutely no requirement in the statute that such changes be discriminatory, merely that they be objected to. An erroneous objection to a non-discriminatory change fully bars bail-out under the proposed law.

[22] See section VIII(a) of the subcommittee report.

[23] See, e.g., Charts B and C of the subcommittee report.

ments will have a profound impact on what this Nation stands for. Each of us can speak all the platitudes we want about concern for civil rights and minority rights, but let us make no mistake about it—both the purpose and the effect of the immediate measure will be to inject racial considerations into increasing numbers of electoral and political decisions that formerly had nothing to do with race. Increasingly, we will be moving in the direction of providing compact and homogeneous political ghettoes for minorities and conceding them their "share" of officeholders, rather than undertaking the more difficult (but ultimately more fruitful) task of attempting to integrate them into the electoral mainstream in this country by requiring them to engage in negotiation and compromise, and to enter into electoral coalitions, in order to build their influence. Minority *representation* in the most primitive sense may be enhanced by the proposed amendments; minority *influence* will suffer enormously.

The new Voting Rights Act will also enhance enormously the role of the Federal judiciary in the State and municipal governmental process. Race-neutral or ethnic-neutral decisions affecting countless aspects of this process will suddenly be subject to new scrutiny by the courts on the basis of whether such aspects are "tenuous", whether they contribute to an "equal opportunity to participate", whether they permit protected minorities to "elect representatives of their choice", and so forth. As the Committee Report accurately states, the new section 2 requires, above all, the application of "the court's overall judgment". There is, in fact, little more to the test than this.

Above all, the present measure plays havoc with traditional notions of civil rights and discrimination, and distorts these concepts beyond all recognition. In the process, it can only contribute toward undermining the virtually-realized consensus in this Nation in behalf of equality and civil rights in their traditional form— equality of opportunity and equality of access, not equality of result and equality of outcome. The historical evolution of this Nation away from the consideration of race in public policy decisions will be halted. The present amendments to the Voting Rights Act represent nothing less than a full retreat from the color-blind principles of law fostered by *Brown* v. *Board of Education*, the Civil Rights Act of 1964, and the original Voting Rights Act itself.

I would urge my colleagues to study this measure with great care while realizing that the political realities of this debate make it unlikely that final action will be determined by anything approximating a careful consideration of the implications of this legislation. In the likely event that this measure become law, I would urge the courts of this country to look critically at the constitutional implications of this legislation. While the courts, in my view, owe great deference to the actions of this branch of the National government, they also owe loyalty to the fundamental principles and institutions of the Constitution— including those of federalism, the separation of powers, and equal protection of the laws. Having been an active participant in the legislative history surrounding this measure, I can only urge the courts to recognize and appreciate the exceptional political circumstances of this debate. Great principles of constitutional law, and public policy, are not normally decided by 389–24 vote margins unless

such circumstances exist. A close examination of the documentary history of this measure will, I believe, cast a great measure of doubt upon the findings and conclusions of both this Committee Report and that of the House of Representatives, from the perspective even of that court least inclined to question the judgement of the Congress.[24]

[24] Although I believe strongly in the analysis presented in these views and in the subcommittee report, I do recognize that the "compromise" amendment adopted in this Committee adds at least a small element of confusion as to Congress' purpose with respect to the new Voting Rights Act. In the event that I am wrong in my interpretation of these amendments—and I fervently hope that I am—a court which reviews this new language should consider at least some of the following factors in attempting to make sense out of this language:

(1) It *does* represent a change in language from the House provision, a change that was necessitated by an effective deadlock in this Committee on such language. Although I do not personally view it this way, the new language was designed by its sponsor as a compromise and was supported by a number of members of this Committee in the same vein. See generally, Executive Session, Committee on the Judiciary, April 27, 29, 1982; May 4, 1982; New York Times, May 4, 1982, pg. A–1; May 5, 1982, pg. A–23; Washington Post, May 5, 1982, pg. A–5.

(2) The change in language clearly emerged as a result of concerns that the House language would promote the concept of proportional representation by race. This concern existed despite a disclaimer in this regard in the House measure and despite language in the House report precluding either a right to proportional representation or a right to proportional repesentation as a remedy. House Rep. No. 97–227 at 30. There is no other way to interpret the new language than to recognize that it attempts to strengthen these prohibitions.

(3) Indeed, that aspect of the proposed language, i.e., prohibition on proportional representation, is probably the clearest aspect of what is generally confusing language. Whatever my own concerns about the success of this effort, there can be little doubt that it was the clear intent of a significant number of supporters of the new language to absolutely and unequivocably preclude proportional representation. Virtually everyone, on either side of this issue, alleged opposition to proportional representation.

(4) The author of the compromise stated expressly that proportional representation was not precluded as a remedy in such language because it was "unnecessary" and that it was a "well established legal principle that remedies must be commensurate with the violation established". Executive Session, May 4, 1982. This concept is reiterated in the Committee Report.

(5) The Committee Report is explicit in its rejection of the views of the Subcommittee on the Constitution with respect to the Subcommittee's (and my own) interpretation of the results test.

(6) The Committee Report could not be more explicit in its adoption of the standard of the Supreme Court in *White* v. *Regester*. It is this test that has repeatedly been offered in definition of the results standard by proponents of the test during subcommittee hearings and by Congressional proponents of the standard. There are significant differences with respect to this standard as evidence by the Supreme Court's decision in *City of Mobile*. Indeed, there is absolutely no indication that *White* is not currently the law of the land never having been over-ruled by the Court in *City of Mobile* or in any other decision. Instead of expressly adopting some generally undisputed legal standard, the Committee has chosen to enshrine in the law the *White* case replete with its apparent inclarities and ambiguities. In other words, the Committee has chosen to adopt language with a history—language that has already been suffused with some meaning by the Court—rather than venture with language that was capable of standing on its own and being interpreted *de novo*. To the extent that they have explicitly anchored this language to *White*—and that point is far clearer in the Committee debates on this issue than even in the Committee Report—courts are obliged to recognize this and to appreciate that Congress (for better or worse) chose to incorporate the case law of *White*—all of its case law—in rendering meaning to the new statutory language. Given the Committee's decision to define the new test in terms of *White*, the Committee Report ironically is reduced substantially in importance.

(7) Despite the "results" language, many proponents of the new test continue to speak in terms of "equal access" to the electoral process. As the author of the compromise remarked during consideration of the measure, "We are talking about access . . .". Executive Session, May 4, 1982.

(8) Proponents of the results test, including the author of the compromise, have consistently emphasized (at least during Senate hearings, if not House hearings) that the results test represented something significantly different than the effects test currently applicable to section 5. Executive Session, May 4, 1982; Subcommittee Report, section VI(a).

(9) In response to a question as far as whether a community with an at-large system could be found in violation of the new test if another community possessing identical characteristics, *except* for the at-large system, was found *not* to be in violation, the author of the compromise indicated that, "It was not my intent that that happen;" The clear implication of that statement is that the existence of an at-large system will not by itself transform a lawful system of government into an unlawful system of government.

(10) While the House Report clearly rejected the idea of responsiveness of public officials as a factor in determining the existence of "discrimination" under its test, House Rep. No. 97–227 at 30 ("The proposed amendment avoids highly subjective factors such as responsiveness of elected officials to the minority community."), the Committee Report expressly recognizes its utility. The author of the proposed compromise stated during Committee consideration that the fact of "unresponsive elected officials" was a fact to

For the sake of the Constitution and for the sake of preventing the re-establisment of 'separate but equal' in this Nation, I fervently hope that there will be those on the Court who will carry out this responsibility. Congress, I regret to say, has, in this instance, failed in its own.

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be considered by courts. Unlike the House test, it is clear that there is not the hostility to the consideration of "subjective" factors by the Senate.

(11) In response to a question concerning the impact of the proposed compromise amendment upon legislative districting, see subcommittee report at fn. 235, the author of the amendment expressly indicated his disagreement with the contention that neighborhoods characterized by large numbers of racial minorities were somehow exempt or immune from normal efforts to secure partisan or ideological advantage through so-called "gerrymandering". The implication of this statement would seem to be that there is no obligation upon communities to maximize the influence of minorities, but simply to treat them fairly. That is an important implication.

(12) The amendment refers to its protections being extended to a "class of citizens protected by subsection (a)". So far as I know, there is no "class" of citizens that are singled out for protection under subsection (a) of the amendment. Section 2 of the Voting Rights Act, as a codification of the Fifteenth Amendment, has always provided guarantees in the area of voting to all individual citizens. Even to the extent that the amended section 2 intends to separate itself from the Fifteenth Amendment, it fails to provide for explicitly "protected groups". It is altogether unclear what this clause in the disclaimer is intended to mean, except that citizens of the United States have the right to participate in the electoral process and elect candidates of their choice. This is doubtlessly true and doubtlessly a reasonable policy.

It is because I do not believe that the proposed language in section 2 tracks the intent of many of its proponents despite their sincerity, and because I do not believe a results test in any form can track such intent, that I oppose this test. I do believe, however, that a court interpreting this measure, which views matters differently from myself, might wish to consider some or all of these factors. The proposed amendments cannot properly be understood without some appreciation of such legislative history.

VOTING RIGHTS ACT

REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION

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The Committee on the Judiciary's Subcommittee on the Constitution, to which was referred S. 1992 to amend the Voting Rights Act of 1965, to extend certain provisions of the Act, having considered the same, reports favorably thereon with amendments and recommends to the full Committee that the bill as amended do pass. The bill would extend intact the Voting Rights Act for another period of ten years.

I. Summary of Issue

The forthcoming debate in the United States Senate on the Voting Rights Act will focus upon one of the most important public policy issues ever to be considered by this body. It is an issue with both profound constitutional implications and profound practical consequences. In summary, the issue is how this Nation will define "civil rights" and "discrimination".

Both in popular parlance and within judicial forums, the concept of racial discrimination has always implied the maltreatment or disparate treatment of individuals because of race or skin color. As the Fifteenth Amendment to the Constitution states, in part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

In other words, discrimination has been viewed as a process by which wrongful decisions were made—decisions reached at least in part because of the race or skin color of an individual.

This conception of discrimination has always been reflected in the constitutional decisions of the judicial branch of our Nation. In interpreting the Equal Protection Clause of the Fourteenth Amendment, for example, the Supreme Court has observed:

> A law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.[1]

In other words, as the Court subsequently observed:

> Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . official action will not be held unconstitutional solely because it results in a racially disproportionate impact.[2]

Proof of discriminatory intent or purpose is the essence of a civil rights violation for the simple reason that there has never been an obligation upon either public or private entities to conduct their affairs in a manner designed to ensure racial balance or proportional representation by minorities in employment, housing, education, voting, and the like. The traditional obligation under civil rights laws has been to conduct public or private affairs in a manner that does not involve disparate treatment of individuals *because* of race or skin color.

What is being proposed in the context of the present Voting Rights Act debate is that Congress alter this traditional standard for identify-

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[1] *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).
[2] *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 252, 264–5 (1977).

ing discrimination, i.e., the "intent" standard, and substitute a new "results" standard. Rather than focusing upon the process of discrimination, the new standard would focus upon electoral results or outcome. The proposed amendment would initiate a landmark transformation in the principal goals and objectives of the Voting Rights Act. It should be understood at the outset that proponents of the results test are no longer talking about "discrimination"; they are simply talking about "disparate impact." These concepts have little to do with one another.

Rather than simply focusing upon those public actions that obstructed or interfered with the access of minorities to the registration and voting processes, the proposed results test would focus upon whether or not minorities were successful in being elected to office. Discrimination would be identified on the basis of whether minorities were proportionately represented (to their population) on elected legislative bodies rather than upon the question of whether minorities had been denied access to registration and the ballot because of their race or skin color.

Despite objections to the description of the results test as one focused upon proportional representation for minorities, there is no other logical meaning to the new test. To speak of "discriminatory results" is to speak purely and simply of racial balance and racial quotas. The premise of the results test is that any disparity between minority population and minority representation evidences discrimination. As the Supreme Court observed in the recent *City of Mobile* v. *Bolden* decision:

> The theory of the dissenting opinion [proposing a "results" test] appears to be that every political group or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its numbers . . . The Equal Protection Clause does not require proportional representation as an imperative of political organization.[3]

Apart from the fact that the results test imports into the Voting Rights Act a theory of discrimination that is inconsistent with the traditional understanding of discrimination, the public policy impact of the new test would be far-reaching. Under the results test, Federal courts will be obliged to dismantle countless systems of State and local Government that are not designed to achieve proportional representation. This is precisely what the plaintiffs attempted to secure in the *Mobile* case and, in fact, were successful in achieving in the lower Federal courts. Despite the fact that there was no proof of discriminatory purpose in the establishment of the electoral (at-large) system in Mobile and despite the fact that there were clear and legitimate nondiscriminatory purposes to such a system, the lower court in Mobile ordered a total revampment of the city's municipal system because it had not achieved proportional representation.

The at-large system of election is the principal immediate target of proponents of the results test.[4] Despite repeated challenges to the

[3] 446 U.S. 55, 75–6 (1980).

[4] One prominent voting rights litigator, Mr. Armand Derfner of the Joint Center for Political Studies, and formerly of the Lawyers Committee for Civil Rights Under Law, observed during the 1975 hearings on the Voting Rights Act,

> And I would hope that maybe ten years from now we would have learned and progressed enough to say that for some of the things that Section 5 has done we no

propriety of at-large systems, the Supreme Court has consistently rejected the notion that the at-large system of election is inherently discriminatory toward minorities.[5] The court in *Mobile* has observed that literally thousands of municipalities and other local governmental units throughout the Nation have adopted an at-large system.[6]

To establish a results test in section 2 would be to place at-large systems in constitutional jeopardy throughout the Nation, particularly if jurisdictions with such electoral systems contained significant numbers of minorities and lacked proportional representation on their elected representative councils or legislatures. Legislative bodies generally that lacked proportional representation of significant minority groups would be subject to close scrutiny by the Federal judiciary, under the proposed results test. To the extent that electoral results become the focus of discrimination analysis, and indeed define the existence or nonexistence of discrimination, it is difficult to conceive how proportional representation by race can avoid being established in the law as the standard for identifying discrimination and, equally important, as the standard for ascertaining the effectiveness of judicial civil rights remedies.

Beyond the fact, however, that the results test, in the view of the subcommittee, will lead to a major transformation in the idea of discrimination as well as to a sharp enhancement of the role of the Federal courts in the electoral process, the results test is an inappropriate test for identifying discrimination for several other reasons. First, the results test will substitute, in the place of a clear and well-understood rule of law that has developed under the intent standard, a standard that is highly uncertain and confusing at best. The rule of judges will effectively replace the rule of law that, up to now, has existed in the area of voting rights. There is no guidance offered to either the courts or to individual communities by the results test as to which electoral structures and arrangements are valid and which are invalid. Given the lack of proportional representation and the existence of any one of a countless number of "objective factors of discrimination," it is difficult to see how a prima facie case (if not an irrebuttable case) of discrimination would not be established.

Second, the results test is objectionable because it would move this

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longer need it while for other things it might be time to put in permanent bans. For example, we might want to put in permanent bans that bar at-large elections not only in the covered states but perhaps in the rest of the country as well. Hearings Before the House Subcommittee on Constitutional and Civil Rights on the Voting Rights Act Extension, March 17, 1975 at 632.

Professor O'Rourke has observed:

> If the revision of Section 2 is not intended to invalidate nationwide at-large elections in every city with a significant minority population, there is nevertheless nothing in the language of Section 2 to foreclose this development. Statement submitted to the Subcommittee on the Constitution by Timothy O'Rourke, Professor, University of Virginia, March 3, 1982.

[5] See, e.g., *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *White* v. *Regester*, 412 U.S. 755 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

[6] 446 U.S. at 60. Approximately 12,000, or two-thirds of the 18,000 municipalities in the Nation, have adopted at-large systems of election. The Municipal Yearbook, International City Managers Association (1972). In addition, of the fifty largest school boards in the United States, approximately two-thirds of those use at-large election systems as well. *Black Voters* v. *McDonough*, 565 F.2d 1, 2 n.2 (1st Cir. 1977). For general discussion of various methods of municipal election and the arguments for each, see E. Banfield & J. Wilson, City Politics 151 (1963); Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L.Rev. 790 (1968); M. Seasongood, Local Government in the United States (1933). The growth of the at-large electoral system occurred during the early decades of the 20th century as a Progressive-inspired reform in response to the corruption that had often been characteristic of municipal ward systems. The theory was that more responsible municipal actions would be taken if each member of the city council was responsible to the entire electorate rather than solely to his own ward or district.

Nation in the direction of increasingly overt policies of race-consciousness. This would mark a sharp departure from the constitutional development of this Nation since the Reconstruction and since the classic dissent by the elder Justice Harlan in *Plessy* v. *Ferguson* in 1897 calling for a "colorblind" Constitution.[7] This would mark a sharp retreat from the notions of discrimination established as the law of our land in *Brown* v. *Board of Education*, the Civil Rights Act of 1964, and indeed the Voting Rights Act itself.

If the results test is incorporated into the Voting Rights Act—and then quite likely into other civil rights statutes as a result— the question of race will intrude constantly into decisions relating to the voting and electoral process. Racial gerrymandering and racial bloc voting will become normal occurrences, given legal and constitutional recognition and sanction by the Voting Rights Act. Increasing, rather than decreasing, focus upon race and ethnicity will take place in the course of otherwise routine voting and electoral decisions.

The Voting Rights Act has proven the most successful civil rights statute in the history of the Nation because it has reflected the overwhelming consensus in this Nation that the most fundamental civil right of all citizens—the right to vote—must be preserved at whatever cost and through whatever commitment required of the Federal Government. Proponents of the House measure would jeopardize this consensus by effecting a radical transformation in the Voting Rights Act from one designed to promote equal access to registration and the ballot box into one designed to ensure equality of outcome and equality of results. It is not a subtle transformation; rather it is one that would result in a total retreat from the original objective of the Voting Rights Act that considerations of race and ethnicity would someday be irrelevant in the electoral process. Under the House-proposed amendments, there would be nothing more important.

II. History of Subcommittee Action

The Subcommittee on the Constitution of the Senate Committee on the Judiciary had referred to it during the 97th Congress five bills relating to the Voting Rights Act: S. 53 (introduced by Senator Hayakawa), S. 895 (introduced by Senator Mathias and Senator Kennedy), S. 1761 (introduced by Senator Cochran), S. 1975 (introduced by Senator Grassley), and S. 1992 (introduced by Senator Mathias and Senator Kennedy). The latter bill was identical to legislation, H.R. 3112, approved by the House of Representatives on October 5, 1981.

As the first priority of the subcommittee during the 2d session of the 97th Congress, the subcommittee held nine days of hearings on the Voting Rights Act from January 27, 1982 through March 1, 1982. Appearing before the subcommittee were the following witnesses: On January 27, the subcommittee took testimony from William French Smith, the Attorney General of the United States; Professor Walter Berns, American Enterprise Institute; Benjamin Hooks, Executive Director, NAACP; Vilma Martinez, Executive Director, Mexican American Legal Defense and Education Fund; Ruth Hinerfeld,

[7] *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

President, League of Women Voters; and U.S. Senator Charles Mathias of Maryland.

On January 28, the Subcommittee heard U.S. Senator Thad Cochran of Mississippi; Laughlin McDonald, Director of the Southern Regional Office of the American Civil Liberties Union; U.S. Representative Henry Hyde of Illinois; Professor Barry Gross, City College of New York; Henry Marsh III, the Mayor of Richmond, Virginia; U.S. Representative Thomas Bliley of Virginia; and Professor Edward Erler, National Humanities Center.

On February 1, the subcommittee heard U.S. Representative Caldwell Butler of Virginia; Professor Susan McManus, University of Houston; Joaquin Avila, Associate Counsel of the Mexican-American Legal Defense and Education Fund; Steven Suitts, Executive Director of the Southern Regional Council; and David Walbert, Attorney and former Professor at Emory University.

On February 2, the subcommittee took testimony from Professor John Bunzel, Hoover Institution at Stanford University; State Senator Henry Kirksey of Mississippi; Professor Michael Levin, City College of New York; Abigail Turner, Attorney; and Armand Derfner, Joint Center for Political Studies.

On February 4, the subcommittee heard U.S. Senator S. I. Hayakawa of California; Governor William Clements of Texas; U.S. Representative James Sensenbrenner of Wisconsin; E. Freeman Leverett, Attorney; Professor Norman Dorsen, New York University, representing the American Civil Liberties Union; Joseph Rauh, Leadership Conference on Civil Rights; and Rolando Rios, Legal Director of the Southwest Voter Registration Project.

On February 11, the subcommittee heard Robert Brinson, Attorney; Thomas McCain, Chairman, Democratic Party of Edgefield County, South Carolina; Arthur Flemming, Chairman of the U.S. Commission on Civil Rights; and Frank Parker, Director of the Voting Rights Project, Lawyers' Committee for Civil Rights under Law.

On February 12, the subcommittee heard Professor Henry Abraham, University of Virginia; Julius Chambers, President, NAACP Legal Defense Fund; Professor Donald Horowitz, Duke University; Professor James Blumstein, Vanderbilt University; and Professor Drew Days, Yale University.

On February 25, the subcommittee heard Irving Younger, Attorney; Professor Archibald Cox, Harvard University, representing Common Cause; Professor George Cochran, University of Mississippi; Nathan Dershowitz, American Jewish Congress; David Brink, President, American Bar Association; Arnoldo Torres, Executive Director, League of United Latin American Citizens; and Charles Coleman, Attorney.

On March 1, the subcommittee heard from U.S. Representative Harold Washington of Illinois; U.S. Representative John Conyers of Michigan; U.S. Representative Walter Fauntroy of the District of Columbia; and William Bradford Reynolds, Assistant Attorney General of the United States for Civil Rights.

In addition, the subcommittee received a large number of written statements from other interested individuals and organizations that will become part of the permanent record of these hearings. Senator

Orrin G. Hatch of Utah, Chairman of the Subcommittee on the Constitution, chaired the hearings of the subcommittee.

On March 24, 1982, the Subcommittee on the Constitution met in executive session to consider legislation to extend the Voting Rights Act. S. 1992, introduced by Senators Mathias and Kennedy, was reported out of subcommittee by a unanimous 5–0 vote following the adoption of a group of five amendments offered en bloc by Senator Grassley. The amendments were as follows:

Amendment 1

Strike everything in Section 1 from page 1, line 3 through page 8, line 14 and insert in lieu thereof, "That this Act may be cited as the "Voting Rights Act Amendments of 1982."

Amendment 2

Strike everything in Section 2 from page 8, line 15 through page 8, line 22 and insert in lieu thereof—

> SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended by—
>
> (1) striking out "seventeen" each time that it appears and inserting in lieu thereof "twenty-seven"; and
>
> (2) striking out "ten" each time that it appears and inserting in lieu thereof "seventeen".

Amendment 3

Striking everything in Section 4 from page 9, line 1 through page 9, line 7.

Amendment 4

Strike everything in Section 5 from page 9, line 8 through page 9, line 10.

Amendment 5

Strike the description of the bill preceding the enactment clause and substitute in lieu thereof: "To amend the Voting Rights Act of 1965 to extend certain provisions for ten years."

The effect of the amendments was to transform S. 1992 into a straight ten-year extension of the Voting Rights Act, the longest such extension in the Act's history. Voting in favor of final reporting of the bill as amended were Chairman Hatch and Subcommittee Members Thurmond, Grassley, DeConcini, and Leahy (by proxy). Because the House-approved legislation, H.R. 3112, has already been placed directly upon the Senate calendar contrary to normal parliamentary practice, the subcommittee chose to prepare this report.

III. LEGISLATIVE EVOLUTION OF THE VOTING RIGHTS ACT

The Fifteenth Amendment to the United States Constitution, ratified in 1870, states:

> SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

Shortly after ratification, Congress enacted two laws pursuant to its enforcement authority in the Fifteenth Amendment designed to outlaw activities interfering with the voting rights of the newly-freed slaves. The Civil Rights Act of 1870 [8] established Federal penalties for interfering with voting in state and Federal elections for reasons of race or color discrimination while the Anti-Lynching (Ku Klux Klan) Act of 1871 [9] sought to penalize state actions which deprived persons of their civil rights.

Despite these efforts, the progress of blacks in securing the protections of the Fifteenth Amendment was slow and erratic. The use of poll taxes, literacy tests, morals requirements, racial gerrymandering, and outright intimidation and harassment continued largely unchecked until well into the 20th century. It was not until the late 1950's that the Federal Government reiterated its constitutional commitment to equality of voting rights by enacting new enforcement legislation. Between 1957 and 1964, Congress enacted three statutes designed to enhance the ability of the Federal Government to challenge discriminatory election laws and procedures.

In 1957, Congress enacted civil rights legislation [10] which authorized the Attorney General to initiate legal action on behalf of individuals denied the opportunity to register or vote on account of race or color. Most importantly, this enabled the aggrieved registrant or voter to shift the cost of the legal challenge to the Federal Government. In addition, the Civil Rights Act of 1957 established the United States Commission on Civil Rights and provided it with responsibility for investigating and reporting on those procedures and devices used by jurisdictions in a discriminatory manner against racial minorities.

In 1960, Congress again acted to strengthen the national government's commitment to full and fair voting rights through passage of additional legislation.[11] The Civil Rights Act of 1960 went significantly beyond the earlier legislation by requiring the retention by local and state officials of Federal election records for a period of 22 months and authorized the Attorney General to inspect such records at his discretion. It also enabled Federal courts to identify "patterns and practices" of racial voting discrimination and to order on a class basis the registration of qualified persons of that race who had been victims of such a "pattern and practice". The Federal courts were authorized to appoint "voting referees" who would be empowered to enter a jurisdiction and register voters.

Finally, Congress enacted the Civil Rights Act of 1964 [12] which established landmark civil rights reforms in a wide number of areas. Title I of the Act prohibited local election officials from applying to applicants for registration tests or standards different from those that had been administered to those already registered to vote. It also estab-

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[8] Act of May 31, 1870 (16 Stat. 140), amended by Act of February 28, 1871 (16 Stat. 433). The surviving statutes of this period are 18 U.S.C. See 241–2 and 42 U.S.C. Sec. 1971(a), 1983, 1985(3).
[9] Act of April 20, 1871 (17 Stat. 13).
[10] Civil Rights Act of 1957, 71 Stat. 634 (42 U.S.C. 1975).
[11] Civil Rights Act of 1960, 74 Stat. 86 (42 U.S.C. 1971).
[12] Civil Rights Act of 1964, 78 Stat. 241 (42 U.S.C. 2000a).

lished a presumption of literacy (although rebuttable) for potential registrants who had completed a 6th grade English-speaking school education. In addition, the act established expedited procedures for judicial resolution of voting rights cases.

A. VOTING RIGHTS ACT OF 1965

Despite this renewed commitment by the Federal Government to enforcement of the guarantees of the Fifteenth Amendment, substantial registration and voting disparities along racial lines continued to exist in many jurisdictions. It was finally in response to the incontrovertible evidence of continuing racial voting discrimination that Congress enacted the single most important legislation in the Nation's history relating to voting rights—the Voting Rights Act of 1965.[13]

This Act marked a significant departure from earlier legislative enactments in the same area in establishing primarily, for the first time, an administrative process aimed at eliminating voting discrimination. Earlier legislation had primarily relied upon the judicial process for the resolution of these problems. The major objectives of the new administrative procedures were to ensure expeditious resolution of alleged voting rights difficulties and to avoid the often-cumbersome process of judicial case-by-case decisionmaking.

Perhaps the most important provision of the Voting Rights Act was section 5 which required any state or political subdivision covered under a formula prescribed in section 4 of the Act (designed to identify jurisdictions with a history of voting discrimination) to "preclear" any changes in voting laws or procedures with the United States Justice Department. No such change could take effect without the permission of the Department. Under section 5, the political subdivision has the responsibility of showing that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

"Covered" jurisdictions, i.e. those required to preclear with the Justice Department, included all states or political subdivisions which met the two-part test of section 4:

> (1) Such a state or subdivision must have employed a "test or device" as of November 1, 1964. Such a "test or device" was defined to include literacy tests, tests of morals or character, or tests requiring educational achievement or knowledge of some particular subject; *and*
>
> (2) Such a state or political subdivision must have had either a voter registration rate of less than 50 percent of age-eligible citizens on that date, or a voter turn-out rate of less than 50 percent during the 1964 election.

No part of the trigger formula in section 4 referred to racial or color distinctions among either registrants or voters, or to racial or color populations within a jurisdiction.

Jurisdictions covered by the trigger formula in the 1965 Act included the entire States of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and counties in North Carolina, Idaho, Arizona, Alaska, and Hawaii.

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[13] Voting Rights Act of 1965, 79 Stat. 437 (42 U.S.C. 1971, 1973 et. seq.).

Covered jurisdictions were to be eligible for "bail-out" (or release) from coverage after a five-year period during which they were required to preclear voting law changes and to temporarily abolish the use of all "tests or devices." In establishing such a time period, Congress recognized that the remedy of preclearance was an extraordinary one that deviated sharply from traditional notions of federalism and state sovereignty over state electoral processes.[14]

Other important provisions of the 1965 Act included:

Section 2, a statutory codification of the Fifteenth Amendment, restated the general prohibitions of that Amendment against the "denial or abridgement" of voting rights "on account of" race or color.

Section 6 authorized the Attorney General to send Federal examiners to list voters for registration in any covered county from which he received twenty or more written complaints of denial of voting rights or whenever he believed on his own that such an action would be necessary.

Section 8 authorized the Attorney General to send election observers to any political subdivision to which an examiner had been earlier sent.

Section 10 prohibited the use of poll taxes in state elections.[15]

Section 11 established various criminal offenses with respect to failure to register voters, or count votes, intimidating or threatening voters, providing false registration information, and voting more than once.

Section 12 established criminal offenses with respect to altering ballots or voting records, and conspiring to interfere with voting rights.

It is important to emphasize that the Voting Rights Act of 1965 is a permanent statute that is not in need of periodic extension. The only temporal provision in the law is the applicability of the preclearance and certain other requirements to covered jurisdictions. By the terms of the 1965 Act, such extraordinary remedies were to be applied for a five-year period after which time Congress presumed the residual effects of earlier discrimination were likely to be sufficiently attenuated, and the covered jurisdictions would be allowed to seek bail-out.

B. 1970 AMENDMENTS

In 1970, however, upon reviewing the impact of the Voting Rights Act, Congress concluded that, while significant progress had been made with respect to voting rights, there was need for an additional extension of the preclearance period for covered jurisdictions. Such jurisdictions, thus, were required to continue to preclear voting law changes for an additional five-year period as Congress redefined the basic bail-out requirement. Instead of covered jurisdictions being required to maintain "clean hands" for a five-year period as provided for in the original 1965 Act, this requirement was changed to ten-

[14] One high-ranking official of the Justice Department has said of the Act that it "represents a substantial departure from . . . ordinary concepts of our federal system." Hearings on Voting Rights Act Extension Before Senate Judiciary Subcommittee on Constitutional Rights, 94th Congress, 1st Session, J. Stanley Pottinger, Assistant Attorney General of the United States, at 536.

[15] The Twenty-Fourth Amendment to the Constitution had earlier been ratified in 1964, outlawing poll taxes in Federal elections. The Supreme Court held in 1966 that state poll taxes violated the Equal Protection clause of the Fourteenth Amendment. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966).

years. "Clean hands" simply meant the avoidance by the jurisdiction of a proscribed "test or device" for the requisite period.

In addition, the basic coverage formula was amended by updating it to include the 1968 elections as well as the 1964 elections. As a result of this change in the trigger formula, counties in Wyoming, California, Arizona, Alaska, and New York were covered, as well as political subdivisions in Connecticut, New Hampshire, Maine, and Massachusetts. The 1970 amendments to the Act also extended nationwide the five-year ban on the use of "tests or devices" as defined by the Act and sought to establish a minimum voting age of 18 in Federal and state elections.[16] Section 202 abolished residency requirements in Federal elections.

C. 1975 AMENDMENTS

In 1975, Congress again reviewed the progress achieved under the 1965 Act and the 1970 amendments and concluded once more that it was necessary to redefine the bail-out requirements for covered jurisdictions. Such jurisdictions were on the verge of satisfying their ten-year obligation of preclearance and the avoidance of voting "tests or devices". In the 1975 amendments to the Voting Rights Act, Congress redefined the bail-out formula to require seventeen years of "clean hands". Jurisdictions covered under the 1965 formula could not hope to bail-out prior to 1982 under the amended formula.

In addition, Congress once again amended and updated the basic coverage formula in section 4 to include the 1972 election as well as the 1964 and the 1968 elections. Most significantly, however, Congress chose to redefine the meaning of what constituted a wrongful "test or device". Such a "test or device" was newly defined to include the use of English-only election materials or ballots in jurisdictions where a single "language-minority" group comprised more than 5 percent of the voting-age population. In addition to states already covered, preclearance was required of those states or political subdivisions which, in 1972, had (a) less than 50 percent voter registration or voter turn-out; (b) employed English-only election materials or ballots; and (c) had a "language-minority" population of more than 5 percent. Such "language-minorities" were defined to include American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage.[17]

Included under the 1975 coverage formula were, in addition to those states covered by the 1965 and 1970 provisions, the states of Texas, Arizona, and Alaska, and counties in California, Colorado, Florida, Michigan, North Carolina, and South Dakota. In addition to the significant expansion in the concept of what constituted a wrongful "test or device" to encompass the use of English-only materials. Congress also established other requirements relating to bilingualism. In section 203 of the Act, Congress required bilingual ballots and bilingual elec-

[16] In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), the Supreme Court subsequently struck down as unconstitutional this provision insofar as it attempted to set requirements for state elections ("the 18 year old vote provisions of the Act are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections."). Id. at 118. The Twenty-Sixth Amendment was ratified in 1971 overturning *Oregon* v. *Mitchell* in this regard and establishing a constitutional right in eighteen year olds to vote in all elections.

[17] There is no requirement that there be a showing that such language minorities speak only that language. They may be entirely fluent in English. Department of Justice Regulation, 28 C.F.R. Section 55.1 et. seq. (1976). See infra note 238.

tion materials and assistance in all jurisdictions in which there were populations of "language minorities" greater than 5 percent and in which the literacy rate among that "language minority" was less than the national average.[18] Finally, the 1975 amendments to the Voting Rights Act made permanent the nationwide ban on literacy tests and other "tests or devices".

In the impending debate, a major issue again will be whether or not Congress will redefine the bail-out standard when a number of jurisdictions covered by the original 1965 Act are on the verge of satisfying the earlier standard, i.e. seventeen years of avoidance of the use of "tests or devices". In the absence of action by Congress, the Voting Rights Act will not "expire" as some have wrongly suggested. Rather what will occur on August 6, 1982 is that a number of covered jurisdictions will finally be permitted to apply to the District Court for the District of Columbia for a declaratory judgment that they have abided by their statutory obligations and ought to be permitted to bail-out. None of the permanent provisions of the Voting Rights Act will "expire", e.g. ban on literacy tests, poll taxes, and discriminatory tests or devices; prohibitions upon certain residency requirements; laws against harassment and intimidation in the voting process; protection of voting rights from denial or abridgement on account of race or color; and so forth. Moreover the present law requires any state or subdivision that has been granted bail-out to remain within the District Court's jurisdiction for an additional five-year "probationary" period.

IV. Judicial Evolution of the Voting Rights Act

A. THE ORIGINAL OBJECTIVE

The Voting Rights Act of 1965 was designed by Congress to "banish the blight of racial discrimination in voting." [19] The racial discrimination to which the Act was directed entailed methods and tactics used to disqualify blacks from registering and voting in Federal and state elections.[20] As discussed previously the Act was the fourth modern legislative attempt at ensuring the rights of disenfranchised Southern blacks, and has proven highly effective.

The emphasis in the original Voting Rights Act was upon equal electoral access through facilitating registration and securing the ballot. As Roy Wilkins, representing the Leadership Conference on Civil Rights, stated in 1965 in testimony before this committee:

> The history of the struggle for the right to participate in Federal, state and local elections goes back to the period of Reconstruction. . . . In too many areas of the Nation, Negroes are still being registered one by one and only after long litigation. We must transform this retail litigation method of registration into a wholesale administration procedure registering all who seek to exercise their democratic birthright.[21]

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[18] Section 203(b) coverage extends to approximately 380 jurisdictions in 29 states.
[19] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966).
[20] For a history of events which led to enactment, and discussions of the original purposes of the Act, see H.R. Rep. No. 439, 89th Cong. 1st Sess. 8–16; S. Rep. No. 162, pt. 3, 89th Cong. 1st Sess. 3–16; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308–25 (1966).
[21] Statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights, Hearings Before the Senate Committee on the Judiciary, on the Voting Rights Act, 89th Congress, 1st Session (1965) at 1005–07.

Professor Gross described the original objectives of the Act as follows:

> The purpose of the Act was precisely and only to increase the number of black registered voters. In the 1960's and earlier, to those who fought for it, equality meant equality of opportunity—in this case, the opportunity to vote.[22]

Professor Bunzel was in firm agreement:

> Originally, the Voting Rights Act was clear that it was directed to remedying disenfranchisement.[23]

This original congressional objective of massive registration and enfranchisement of blacks has been substantially transformed since 1965. The present debate reflects this transformation since it focuses upon claims to equal electoral "results," maximum political "effectiveness," and "diluted" votes. The evolution of the 1965 Act is in large part attributable to a number of important judicial decisions.

The legislation was challenged shortly after its enactment in *South Carolina* v. *Katzenbach*,[24] wherein the Supreme Court upheld the challenged provisions of the Act as constitutionally permissible methods of protecting the right to register and vote. Although acknowledging that the preclearance provisions of section 5 "may have been an uncommon exercise of congressional power," [25] Chief Justice Warren, speaking for the Court, stated that "exceptional conditions can justify legislative measures not otherwise appropriate." [26] Thus, the preclearance provisions were upheld "under the compulsion of . . . unique circumstances" [27] which Congress had found from its own evidentiary investigation to exist in the covered jurisdictions.[28] From this rather limited holding based upon "exceptional conditions" and "unique circumstances" then extant in the covered jurisdictions, there evolved a series of cases through which the Court identified additional objectives under the Act's preclearance provisions.

The principal case in the judicial evolution of the Voting Rights Act was the Court's 1969 decision in *Allen* v. *State Board of Elections*.[29] In an opinion by Chief Justice Warren, the Court held that the Act's preclearance provisions were applicable not only to new laws which might tend to deny blacks their right to register and vote, but to "any state enactment which altered the election law of a covered state *in even a minor way*." [30] In *Allen*, the changes in state laws did

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[22] Hearings on the Voting Rights Act Extension Before the Senate Judiciary Subcommittee on the Constitution, 97th Congress, 2d Session (1982) (hereafter "Senate Hearings") January 28, 1982, Barry Gross, Professor, City College of New York.

[23] Senate Hearings, February 2, 1982, John Bunzel, Senior Fellow, Hoover Institution, Stanford University.

[24] 383 U.S. 301 (1966).

[25] Id. at 334.

[26] Id. In his dissent as to the constitutionality of Seection 5 in *South Carolina* v. *Katzenbach*, Justice Black noted:

> One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them.

383 U.S. at 359. (Footnote omitted.)

[27] Id. at 335.

[28] Id.

[29] 393 U.S. 544 (1969).

[30] Id. at 566. (Emphasis supplied.)

not relate to the process by which voters were registered and had their ballots counted, but to such things as a change from single-member districts to at-large voting in the election of county supervisors, changing of a particular office from elective to appointive, and changes in qualification procedures of independent candidates.[31] Under the broad construction accorded section 5 by the *Allen* court, covered states must preclear all laws which may affect the electoral process in any way. As will be noted, the *Allen* decision effected a substantial transformation of the Voting Rights Act.[32] The breadth of the scope accorded the Act by *Allen* served as the catalyst for further expansion of Federal control over electoral changes in covered jurisdictions.

B. NEW OBJECTIVES

In the 1971 decision of *Perkins* v. *Matthews*,[33] a divided Supreme Court held that annexations were subject to preclearance and reiterated its *Allen* holding that a change to at-large elections was also covered. The Court further expanded the scope of preclearance requirements to include legislative reapportionments in *Georgia* v. *United States*.[34] All such actions were required to be submitted to the Justice Department for approval.

The far-ranging implications of this expansion were evidenced in two important cases which followed. In *City of Petersburg* v. *United States*,[35] the City of Petersburg, Virginia had annexed an area that had been under consideration for nearly 5 years. The annexation was supported by both black and white citizens and involved an area logically suitable for annexation for tax and other reasons. The effect of the annexation, however, was to reduce the black population from 55 percent to 46 percent. When the annexation was submitted for preclearance, the District Court held that it was not racially inspired, but nevertheless found that the annexation would have the effect of decreasing minority voting influence. Because of this the Court approved the annexation only on condition that Petersburg change to ward elections so that blacks would be insured of representation "reasonably equivalent to their political strength in the enlarged community." [36] The Court specifically noted that the mere fact that blacks made up a smaller percentage of the city after the annexation did not amount to a violation of the Act, so long as the court-imposed system

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[31] Id. at 550–52.

[32] In the *Allen* case, Justice Harlan, dissenting in part, observed:

> . . . the Court has now construed § 5 to require a revolutionary innovation in American government that goes far beyond that which was accomplished by § 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. But the action taken by Congress in § 4 proceeded on the premise that once Negroes had gained free access to the ballot box, state governments would then be suitably responsive to their voice, and federal intervention would not be justified. In moving against "tests and devices" in § 4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads § 5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by § 4, despite the fact that the two provisions were designed simply to interlock. 393 U.S. at 585–6.

[33] 400 U.S. 379 (1971).

[34] 411 U.S. 526 (1973). In *Georgia*, the Court held that the Attorney General could object to a preclearance submission even though he could not determine that a change had the purpose or effect of denying or abridging the right to vote. In other words it held that the Attorney General could validly place the burden of proof on the submitting jurisdiction that a change did not have such a purpose or effect.

[35] 354 F.Supp. 1021 (D.D.C. 1973), affirmed *per curiam* (without opinion) 410 U.S. 962 (1973). See note 36 infra.

[36] See *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975), wherein the Court, through a majority opinion by Justice White, explained its *per curium* affirmance in *City of Petersburg* v. *United States*, 410 U.S. 962 (1973).

of ward elections insured blacks of safe districts. Thus, the ideal of proportionality in representation was introduced, although only in the context of covered jurisdictions.

This precursor to "proportional representation" was followed by the Supreme Court's 1975 decision in *City of Richmond* v. *United States.*[37] The annexation in *City of Richmond* reduced the black population in Richmond from 52 percent to 42 percent. The Court reversed the lower court's disapproval of Richmond's preclearance application and remanded the case for reconsideration in light of its explanation that the *City of Petersburg* decision was intended to "afford [blacks] representation reasonably equivalent to their political strength."[38]

The concept of proportional representation was again involved in *United Jewish Organizations* v. *Carey*,[39] which related to the Attorney General's rejection of a 1972 legislative redistricting by New York as it applied to Brooklyn, a covered jurisdiction under the Act. The Attorney General originally ruled that there were an insufficient number of election districts with minority populations large enough for minority candidates to likely prevail. The Attorney General indicated that a minority population of 65 percent was necessary to create a safe minority seat.[40] In a new plan adopted in 1974, the Legislature met the objections of the Attorney General, but in so doing, divided a community of Hasidic Jews which had previously resided in a single district. The Attorney General approved the plan, but members of the Hasidic community objected claiming that they themselves had been the victims of discrimination.

The Supreme Court rejected their claim. Although unable to agree on an opinion, seven members of the Court did agree that New York's use of racial criteria in revising the reapportionment plan in order to obtain the Attorney General's approval under the Voting Rights Act did not violate the Fourteenth and Fifteenth Amendment rights of the Hasidic Jews.

The preceding line of cases, all the progeny of *Allen* v. *State Board of Elections*,[41] constituted a major judicial expansion of the Act's

[37] 422 U.S. 358 (1975).

[38] Id. at 370. For further illustrations of the proportional representation principle at work, see *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Circuit) (1973) ("a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes"); and *Kirksey* v. *Board of Supervisors of Hinds County*, 528 F.2d 536 (5th Circuit) (1976) (a single member district plan was overturned until two safe seats out of five were created for the county's 40% black population). See also *City of Port Arthur* v. *United States*, 517 F.Supp. 987 (D.D.C. 1981) *infra* note 50 and accompanying text.

[39] 430 U.S. 144 (1977). Nathan Dershowitz of the American Jewish Congress has described the product of the *UJO* case as follows: "The Williamsburg section of Brooklyn has been tortuously gerrymandered in an attempt to ensure the election of minority group members." Dershowitz, "Tampering with the Voting Rights Act." Congress Monthly, May 1981, at 9. He describes the result further as "the institutionalization of ethnic representation."

[40] As Professor George C. Cochran of the University of Mississippi Law School testified:

> In interpreting the definitional parameters of districts which give blacks an opportunity to elect the candidate of their own choice, the District Court for the District of Columbia is implementing what seems to be 65 percent voting districts for covered jurisdictions; that is, a 65 percent level of minority population in a given district is viewed by that court as one which will "give blacks an opportunity to elect a candidate of their choice." . . . But the 65 percent rule, which is becoming more and more common in this section 5 business, is something that had its beginning stage in *United Jewish Organizations* and is now being carried over into a proper interpretation of section 5 as to whether or not a given political subdivision's voting scenario has the effect of denying minorities an opportunity to elect a candidate of their own choice . . . In the *UJO* case, the 65 percent rule came from a phone call from an unknown staff member at the Voting Rights section of the Department of Justice to attorneys representing the State of New York. Senate Hearings, February 25, 1982.

One witness referred to a case in which the Justice Department required that a 70 percent minority district be created before it would agree to preclear a single-member districting plan. Senate Hearings, February 4, 1982, E. Freeman Leverett, attorney, Elberton, Ga.

[41] 393 U.S. 544 (1969).

original focus upon facilitating registration and securing the ballot.[42] As Professor Thernstrom has written:

> The traditional concern of civil rights advocates had been access to the ballot... [These expansions] assume a Federally guaranteed right to maximum political *effectiveness*. Nowadays local electoral arrangements are expected to conform to Federal executive and judicial guidelines established to maximize the political strength of racial and ethnic minorities, not merely to provide equal electoral opportunity.[43]

More recent expansion of section 5 occurred in two 1978 decisions. In *United States* v. *Board of Commissioners of Sheffield*,[44] the Court held that section 5 applied to political subdivisions within a covered jurisdiction which have any influence over any aspect of the electoral process, whether or not they conduct voter registration.[45] Sheffield was required to pre-clear its electoral change from a commissioner to a mayor-council form of government. *Sheffield* reaffirmed the drift away from the original focus of the Voting Rights Act of equal access to the registration and voting process to focus upon the electoral process itself. In *Dougherty County Board of Education* v. *White*,[46] the Court held that a school board rule requiring all employees to take unpaid leaves of absence while campaigning for elective office was subject to preclearance under section 5. Thus, the Court held that the Voting Rights Act reached changes made by political subdivisions that neither conducted voter registration nor even conducted elections.

C. SECTION 5 V. SECTION 2

The transformation which had taken place in section 5 was confirmed by the Court in *City of Rome* v. *United States*,[47] wherein the Court held that although electoral changes in Rome, Georgia, were enacted without discriminatory purpose, they were nevertheless prohibited under section 5 of the Act because of their discriminatory effect. Thus, the Court affirmed that the standard of conduct in covered jurisdictions seeking preclearance pursuant to section 5 may be measured exclusively by the effects of a change.[48] The evolution of section 5 was fundamentally complete—having been largely transformed from a provision focused upon access to registration and the

[42] *Beer* v. *United States*, 425 U.S. 130 (1976) involved the rejection by the Attorney General and District Court of a reapportionment plan submitted by the city of New Orleans, because the plan would not have produced black representation on the city council proportional to black population in the city. The Supreme Court reversed, holding that section 5 prohibits only those voting changes which result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Id. at 141.

[43] Thernstrom, "The Odd Evolution of the Voting Rights Act," 55 The Public Interest 49, 50 (1979). See generally this article for a discussion of the judicial evolution of the Voting Rights Act.

[44] 435 U.S. 110 (1978).

[45] Compare Section 14(c)(2) of the act, which provides:

> The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

[46] 439 U.S. 32 (1978).

[47] 446 U.S. 156 (1980).

[48] Id. See generally, McClellan, "Fiddling with the Constitution While Rome Burns: The Case Against the Voting Rights Act of 1965," 42 La. L. Rev. 1 (1981); Keady & Cochran, "Section 5 of the Voting Rights Act: A Time for Revision," 69 Ky. Law J. 4 (1980).

ballot to one focused upon the electoral process itself. In the narrow context of section 5, the "effects" test was constitutional.[49]

A recent and telling application of the "effects" standard by the District of Columbia District Court can be found in *City of Port Arthur* v. *United States*,[50] an annexation case in which the court stated:

> The conclusion reached by this Court is that none of the electoral systems proposed by plaintiff Port Arthur affords the black citizens of the City the requisite opportunity to achieve representation commensurate with their voting strength in the enlarged community. Blacks comprise 40.56 percent of the total post-expansion population, and we estimate that they constitute 35 percent of the voting-age population. [None of the proposed schemes] offer the black community a reasonable possibility of obtaining representation which would reflect political power of that magnitude.[51]

This transformation from a focus upon access to the ballot to a focus upon the electoral process itself, and proportional representation for covered jurisdictions under section 5 would also have occurred in the context of section 2 but for the case of *City of Mobile* v. *Bolden*.[52] In *Mobile*, however, the Court reaffirmed original understandings of section 2 and the Fifteenth Amendment. *Mobile* involved a class action on behalf of all black citizens of the Alabama city wherein plaintiffs alleged that the city's practice of electing commissioners through an at-large system unfairly "diluted" minority voting strength in violation of the Fourteenth and Fifteenth Amendments. The district court,[53] although finding that blacks in the city registered and voted without hinderance, nonetheless agreed with plaintiffs and held that Mobile's at-large elections operated unlawfully with respect to blacks. The Fifth Circuit affirmed,[54] but on appeal, the Supreme Court reversed and remanded. The plurality opinion stated:

> The Fifteenth Amendment does not entail the right to have Negro candidates elected . . . That Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hinderance," the District Court and Court of Appeals were in error in believing that the appellant invaded the protection of that Amendment in the present case.[55]

Thus, the Court reaffirmed that purposeful discrimination is required for the Fifteenth Amendment to be violated and that, since section

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[49] The Court relied on *South Carolina* v. *Katzenbach* and recalled the determinations by Congress which undergirded the preclearance requirement. As with that case, *Rome's* upholding of the constitutionality of the "effects" test in Section 5 was a highly limited one in this regard. Id. at 174.
[50] 517 F.Supp. 987 (D.D.C. 1981).
[51] Id. at 1014, 1015.
[52] 446 U.S. 55 (1980).
[53] 423 F.Supp. 384 (S.D. Ala. 1976).
[54] 571 F.2d 238 (5th Cir. 1978).
[55] 446 U.S. at 65.

2 of the Act was a codification of that Amendment, the "intent" test applied in all actions under that section.[56]

The proponents of the House amendment to section 2 would overturn the Court's decision in the *Mobile* case by eliminating the requirement of proof of intentional discrimination and simply require proof of discriminatory "results." The change would facilitate a transformation of section 2 from its original focus to new and disturbing objectives of proportionality in representation.

In summary, the subcommittee believes that section 5 of the Voting Rights Act of 1965 has undergone a significant judicial evolution. The original purpose was to provide racial minorities with access to the ballot. In the intervening years, the focus has changed to the entire electoral process. As Professor Erler testified:

> In more recent years . . . emphasis has shifted from the issue of equal access to the ballot for racial minorities to the issue of equal results. The issue is no longer typically conceived of in terms of "the right to vote," but in terms of "the right to an effective vote"; no longer in terms of "disfranchisement" but in terms of "dilution." The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.[57]

The proposal to change section 2 seeks to begin this same process for that section. Indeed, proponents of the House amendment rarely speak of "the right to vote" any more. Instead, such phrases as "equal political participation," "equal opportunity in the political process," "the fair right to vote," and "meaningful participation" are used.[58] This subcommittee views with concern any proposal to institute such a new focus in section 2 and to bring to this section concepts of proportional representation that have been developed in other sections on limited constitutional grounds.

V. Action by House of Representatives

During the Senate hearings, great emphasis has been placed on the substantial vote in the House of Representatives in support of final passage of H.R. 3112, the House-version of the Voting Rights Act extension. As Senator Metzenbaum remarked on the opening day of hearings:

> I have difficulty understanding why the Administration is not on the side of the overwhelming majority of the House . . .

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[56] Id. at 60–61. Justice Stewart noted: "It is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." There was no apparent disagreement with this finding from any other member of the Court.

[57] Senate Hearings, January 28, 1982. Edward Erler, Professor, National Humanities Center. The hearings were unpublished at the time of this report and available only in transcript form.

[58] See e.g. Senate Hearings, February 12, 1982, Drew Days, Professor, Yale School of Law; January 28, 1982, Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union. See also H.R. Rep. No. 97–227, 31 (1981).

> Why in view of the fact that all of the civil rights groups now are on the side of the 389 members of the House? [59]

Final passage in the House of Representatives of H.R. 3112 was achieved on October 5, 1981 by a vote of 389–24 with substantial majorities of both parties in support of such passage.

It is only because of the continued emphasis upon the House action that this subcommittee believes that brief mention ought to be made of the circumstances of such action. While such scrutiny may not be a common part of Senate consideration, neither is the recurrent argument that the magnitude of the House vote somehow casts doubt upon the merits of the arguments of Senators who are in opposition to the House position.

H.R. 3112, as approved by the House of Representatives, would amend section 2 of the Voting Rights Act to establish a "results" test for identifying voting discrimination in place of the present "intent" standard. In addition, it would make permanent the pre-clearance provisions of section 5 for those jurisdictions subject to coverage under the coverage formula in section 4. It would, however, create a new and complex bail-out procedure for such jurisdictions which would become effective in 1984.

What this subcommittee finds particularly noteworthy in the legislative history of H.R. 3112 in the House is the virtually total lack of opportunity for individuals opposed to these changes in the law to testify before the House Judiciary Committee. On an issue of the magnitude of the Voting Rights Act, with the highly controversial changes proposed by the House measure, it is remarkable that so little opportunity to participate was afforded those individuals who questioned the House amendments.

During the 18 days of hearings that took place in the House on the extension of the Voting Rights Act, the Judiciary Committee heard 156 witnesses testify on this issue. Of these, only 13 expressed any reservations about the House measure and some of these were of a relatively trivial nature. It is the view of this subcommittee that such a gross imbalance on a measure of this importance cannot be attributed solely to an inability to identify individuals who possessed concerns about the House bill. There has been no shortage of interested individuals who have testified from this perspective during the Senate hearings.

Of the small handful of witnesses who did testify in the House with reservations about H.R. 3112, it is interesting to note the remarks of Mr. Colom, a black attorney from Mississippi. In response to a question from Representative Hyde asking whether or not he had been subject to pressure not to testify, he observed:

> It stopped being pressure and started being intimidation at some point. Apparently someone called most of my colleagues in Mississippi and I found my friends, my black friends in the Republican Party, calling me up asking if I was coming up here to testify against the Voting Rights Act . . . my father who's co-chairman of the Democratic Party in one county said that he had never heard such vicious things about his son.[60]

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[59] Senate Hearings, January 27, 1982, U.S. Senator Howard Metzenbaum.

[60] Hearings on Extension of the Voting Rights Act by the House Judiciary Subcommittee on Constitutional and Civil Rights (Hereinafter "House Hearings"), June 25, 1981, Wilbur Colom, Esq., Part III, at 2102–03.

Similar allegations have been made about other potential witnesses who might have opposed the House bill.[61]

What is perhaps most remarkable about the House legislative process on H.R. 3112 is that not one of the 156 witnesses who testified expressed any substantial difficulties with the proposed amendment to section 2 of the Voting Rights Act. Indeed, but a single day of the 18 days of hearings was even devoted to this issue with all three witnesses testifying on that date indicating full support for the proposed amendment.[62] Given (1) the attention devoted to this issue during the Senate hearings; (2) the agreement by both sides of the importance of the issue;[63] (3) the primary concern for this issue by the administration; and (4) the obvious importance of the section 2 change for civil rights law generally, it is surprising that the House amendment to section 2 could have been given such slight attention during 18 days of House hearings.

Serious concern about the character of House debate was later expressed before the subcommittee by members of the House itself. As Representative Butler observed in testimony before the subcommittee:

> The most significant change approved by the House [section 2] went through largely unnoticed . . . while the importance and potential impact of this basic change cannot be underestimated, the failure of the House to consider it carefully cannot be overstated.[64]

As Representative Hyde, a leading proponent of extension of the Voting Rights Act, also observed before this subcommittee:

> The Voting Rights Act is a very complex piece of legislation which has been merchandised in extraordinarily complex terms. By the time it reached the floor, suggestions that alternate views should be considered were quickly met with harsh charges that any deviation whatsoever from what was pushed through the full Judiciary Committee merely reflected "code words for not extending the Act." This intimidating style of lobbying had the ironic effect, although clearly intended, of limiting serious debate and creating a wave of apprehension among those who might have sincerely questioned some of the bill's language. No one wishes to be the target of racist characterizations and the final House vote reflected more of an overwhelming statement of support for the principle represented by the Act than it did concurrence with each and every sentence or concept it contains.[65]

Given the environment of the House consideration of H.R. 3112, this subcommittee is not persuaded that special deference ought to be accorded the outcome of that consideration. This subcommittee has endeavored to provide a fair opportunity for all responsible views to be heard. It is the obligation of the United States Senate, the "world's

[61] See, e.g., Senate Hearings, January 28, 1982, U.S. Representative Henry Hyde; Bunzel, "Voting Rights Hardball" Wall St. Journal, March 19, 1982; Brimelow, "Uncivil Act" Barron's, January 25, 1982.

[62] House Hearings, June 24, 1981. Testifying in support of the amendment to Section 2 were James Blacksher, David Walbert, and Armand Derfner. Part III, at 2029–65.

[63] An example of a witness favoring the House amendments to Section 2 who nevertheless recognized the importance of the proposed change is Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund, January 27, 1982.

[64] Senate Hearings, February 1, 1982. U.S. Representative M. Caldwell Butler.

[65] Senate Hearings, January 28, 1982. U.S. Representative Henry Hyde.

most deliberative legislative body" to see that a different environment of debate occurs within its own chambers.

VI. Section 2 of the Act

Section 2 of the Voting Rights Act is a codification of the Fifteenth Amendment and, like that amendment, forbids discrimination with respect to voting rights. Section 2 states:

> No voting qualifications or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right to vote on account of race or color.

Section 2 is a permanent provision of the Voting Rights Act and does not expire this year, or any year. It applies to both changes in voting laws and procedures, as well as existing laws and procedures, and it applies in both covered jurisdictions and non-covered jurisdictions.[66] For the past seventeen years, section 2 has stood as a basic and non-controversial provision to ensure that any discriminatory voting law or procedure could be successfully challenged and voided.

A. Intent v. Results

Given the success of the Voting Rights Act and the fact that section 2 is a permanent provision of the law, what is the present controversy concerning section 2? The current issue concerning section 2 is the question of what must be shown in order to establish a violation of the section. In other words, the fundamental issue is the one of how civil rights violations will be identified. Inherent in this issue are the very definitions of "civil rights" and "discrimination."[67]

The Supreme Court addressed this critical issue in *City of Mobile* v. *Bolden*.[68] In this decision, the Court held that section 2 was intended to codify the Fifteenth Amendment[69] and then held that a claim under the Amendment required proof that the voting law or procedure in question must have been established or maintained[70] because of a discriminatory intent or purpose. As the Court observed:

> While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.[71]

It follows then that proof of a claim under section 2 entails the requirement of showing discriminatory intent or purpose.

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[66] In covered jurisdictions under section 5, it is necessary to preclear only changes in voting qualifications, prerequisites to voting, or standards, practices, or procedures with respect to voting *different* from those in effect in the jurisdictions on the dates in which the trigger formulas were applicable.

[67] On the centrality of intent analysis to civil rights law generally, see Senate Hearings, February 2, 1982, Michael Levin, Professor, City College of New York.

[68] 446 U.S. 55 (1980).

[69] There was no disagreement on this point among the Justices. In addition, the Carter Administration Justice Department, in filing its brief for appellees in *Mobile*, described Section 2 as a "rearticulation" of the Fifteenth Amendment. Brief of the United States as Amicus Curiae at 84, *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[70] Much of the confusion regarding the intent controversy has, in part, been due to the failure by some to acknowledge that a discriminatory purpose may also be proven by a showing that a law has been "maintained" or "operated" for such a purpose, not simply that it was originally enacted for this purpose. See, e.g., *Whitcomb* v. *Chavis*, 403 U.S. 124 149 (1979); *White* v. *Regester*, 412 U.S. 755, 769 (1973).

[71] 446 U.S. at 68.

The Court's equation of section 2 with the Fifteenth Amendment was based on a review and analysis of legislative history:

> Section 2 was an uncontroversial provision in the Voting Rights Act whose other provisions engendered protracted dispute. The House report on the bill simply recited that section 2 "grants a right to be free from enactment or enforcement of voting qualifications or practices which deny or abridge the right to vote on account of race or color." H.R. Report No. 89–439 at 23 (1965); S. Report No. 89–162, part 3, at 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of section 5 of the proposed legislation were prohibited from discriminating against Negro voters by section 2 which he termed "almost a rephrasing of the Fifteenth Amendment." Attorney General Katzenbach agreed. Senate Hearings, part 1, at 208 (1965).[72]

Until the present debate, there has been virtually no disagreement with the proposition that section 2 has always been intended to codify the Fifteenth Amendment.

Controversy concerning the *Mobile* decision, and the intent test required under *Mobile*, stems from the contentions that the decision was contrary to the original intention of Congress,[73] contrary to prior law,[74] and establishes a test for identifying discrimination which is difficult, if not impossible, to satisfy.[75] Since these arguments serve as the foundation for the case that *Mobile* ought to be overturned, they merit careful consideration.

Congressional intent

The first argument raised by proponents of a results test in section 2 in place of the existing intent test, is that such a test would be more consistent with the original intention of the Voting Rights Act.[76] This subcommittee strongly rejects this contention and believes that the Supreme Court properly interpreted the original intent of Congress with respect to section 2. The subcommittee notes, for example, that Congress chose specifically to use the concept of a results or effects test in other parts of the Act. In sections 4 and 5 of the Act, Congress established an explicit although highly limited use of this test. The fact that such language was *omitted* from section 2 is conspicuous and telling. If Congress had intended to use a results or effects test in section 2, they had already demonstrated that they were quite capable of drafting such a provision. Congress chose pointedly not to do this.

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[72] Id. at 61.

[73] See e.g., Senate Hearings, February 4, 1982, U.S. Representative James Sensenbrenner; February 11, 1982, Frank Parker, Director, Voting Rights Project, Lawyers Committee for Civil Rights Under Law.

[74] See e.g., Senate Hearings, February 1, 1982. David Walbert, attorney and former Professor, Emory University School of Law; February 25, 1982, Archibald Cox, Professor, Harvard University Law School, representing Common Cause.

[75] See e.g., Senate Hearings, January 28, 1982, Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union; February 4, 1982, U.S. Representative James Sensenbrenner.

[76] See e.g., Senate Hearings, February 1, 1982, Steven Suitts, Executive Director, Southern Regional Council.

The unusual standard in sections 4 and 5 was a clear function of the extraordinary objectives of those sections.[77] In those provisions, Congress was addressing selected regions of the country with respect to which there had been identified histories of discrimination and histories of efforts to circumvent Federal anti-discrimination initiatives. It was only as a result of these findings that Congress was even constitutionally empowered to enact these sections.[78] Specifically, it was a function of the fact that the provisions in sections 4 and 5 were designed to be remedial and temporary in nature that the Court sustained their constitutional validity.[79]

Great emphasis has been placed upon a single remark of Attorney General Katzenbach during the course of Senate hearings to evidence that an effects test was originally intended by Congress in section 2. The Attorney General, according to the argument, made clear that a section 2 violation could be established "if [an action's] purpose or effect" was to deny or abridge the right to vote.[80] Quite apart from the fact that a single chance remark by an individual does not constitute a conclusive legislative history, the Katzenbach statement can be used with equal strength by proponents of maintaining the present intent test. In response to a question by Senator Fong about whether or not restricted registration hours by a jurisdiction would be the kind of "procedure" encompassed by section 2 that would permit a suit, the Attorney General responded, "I would suppose that you could *if it had that purpose.*" [81] He subsequently proceeded to make another statement alluding to both purpose and effect in a context suggesting confusion between section 2 and section 5. The Attorney General's statement is a wholly isolated remark in the midst of thousands of pages of hearings and floor debate; to the extent that it is treated as dispositive of the issue, it can equally be relied upon by either side.[82]

The subcommittee considers the fact that Congress chose not to utilize language in section 2 that it expressly used in sections 4 and 5 (i.e., "effects") to be far more persuasive of original congressional intent, as well as the fact that the concept of an effects standard was discussed thoroughly in the context of sections 4 and 5 but not at all in the context of section 2.

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[77] *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). The Court noted at 334, "The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This power may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

[78] See supra note 77. See also, *City of Rome* v. *United States*, 446 U.S. 156 (1980) in which it was again noted "that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act," 179–180, and that the 1975 extension, "was plainly a constitutional method of enforcing the Fifteenth Amendment," Id. at 182.

[79] Id.

[80] Senate Hearings, February 12, 1982, discussion between U.S. Senator Charles Mathias and Drew Days, Professor, Yale School of Law, regarding Attorney General Katzenbach's testimony in the 1965 Hearings about the original intent of the Voting Rights Act.

[81] 1965 Senate hearings, Nicholas DeB. Katzenbach, Attorney General of the United States, March 25, 1965, at 191–2.

[82] See supra note 81. See also 1965 Senate Hearings at 208 in which Attorney General Katzenbach agreed with Senator Dirksen in his assessment of Section 2 as "almost a rephrasing of the 15th Amendment." It is also worth noting that Katzenbach was discussing the Act in terms of its original objectives—equal access to registration and the ballot. The judicial evolution that later occurred, see supra Section III, clearly transformed the Act into one focused upon the electoral process itself. Katzenbach did not allude to such issues as annexations, election systems, districting and apportionment issues, and the like. He could not have foreseen the marked metamorphosis of the Voting Rights Act in his 1965 testimony.

Prior law

In response to the second argument of proponents of the results test that *Mobile* effected a significant change in prior law, the subcommittee would note again the remarks of the Supreme Court in *Mobile:*

> [None of the Court's Fifteen Amendment decisions] has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.[83]

There is absolutely no Court decision that results proponents can point to that holds that proof of discriminatory purpose or intent is not required either in establishing a Fifteenth Amendment violation or a section 2 violation.

In this regard, proponents rely almost exclusively on a 1973 Supreme Court decision, *White* v. *Regester*.[84] In that ca., the Court upheld a challenge to an at-large voting system for members of the Texas House of Representatives in several Texas counties.

White is a rather tenuous foundation for the far-reaching changes presently being proposed in section 2 for a number of reasons: First, *White* was neither a Fifteenth Amendment nor a section 2 case; it was a Fourteenth Amendment case. It is strange that proponents should rely upon it to suggest that the *Mobile* interpretation of the Fifteenth Amendment was mistaken. Second, if that is not enough to discredit the authority of *White* with respect to the *Mobile* issue, it should be noted that nowhere in *White* did the Court even use the term "results". If that is the case, it is difficult to understand how the term "results" in section 2 is expected to trigger the application of the *White* case. Third, even as a Fourteenth Amendment decision, the *White* case involved a requirement of intentional or purposeful discrimination.

As the Court in *Mobile* observed about the argument that *White* represented a different test for discrimination:

> [In *White*], the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white election officials . . . *White* v. *Regester* is thus consistent with the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.[85]

Finally, and perhaps even more compelling, is that Justice White who dissented in *Mobile* and who wrote the *White* opinion agreed that it was consistent with the intent or purpose requirement. Justice White disagreed with the Court's opinion because he believed that the plaintiffs had satisfied the intent or purpose standard in *Mobile*, not because he disagreed with the standard itself. He observed in dissent:

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[83] 446 U.S. at 63.
[84] 412 U.S. 755 (1973).
[85] 446 U.S. at 69. See also *Graves* v. *Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972) which discusses at some length the voting rights background in Dallas and Bexar counties (Texas) that was before the Court in *White* v. *Regester*. *Graves* was affirmed by the Supreme Court in *White* v. *Regester*. There can be little doubt that there was substantial discriminatory purpose at work in these counties on the basis of the District Court's findings in *Graves*. It is also interesting to note that in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), decided on the same day as *White*, the Court pointed out at 754 that multimember districts might be vulnerable "if racial or political groups have been *fenced out* of the political process and their voting strength *invidiously* minimized." (Emphasis supplied.)

> The Court's decision cannot be understood to flow from our recognition in *Washington* v. *Davis* that the Equal Protection Clause forbids only purposeful discrimination . . . Even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of City Commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process . . . Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.[86]

Again, it is important to emphasize that even in dissent, Justice White, the author of the *White* opinion, agreed with the Court that the case was consistent with the intent or purpose requirement.

The subcommittee would add that, if the results test is nothing more than the standard set down by the Court in *White* v. *Regester*, it is unclear why it is necessary to change the present law since *Mobile* did not overrule *White* or any earlier Court decision. If the results test is consistent with *White*, then it should continue to be consistant even after *Mobile*. Both *White* and *Mobile* are in effect today.

If, despite all, proponents of the results test persist in their view that *Mobile* altered the *White* law, then, at the very least, it is incumbent upon them to demonstrate what precisely the *White* law was. It is not enough to suggest that we ought to rely for guidance upon a law that was interpreted by a clear majority of the Court in a totally contrary manner to the manner in which results proponents would like to interpret it. Until such proponents can explain the results test, this subcommittee can conclude nothing else than that adoption of the test will lead into totally uncharted judicial waters.

The history of Supreme Court decisions is totally consistent on the foundational requirement that constitutional civil rights violations require proof of discriminatory intent or purpose. However, the Court has sometimes been less than explicit on this point only because it was not until the growth of "affirmative action" concepts of civil rights in the late 1960's and early 1970's that anyone believed that "discrimination" meant anything *other* than wrongful treatment of an individual *because* of race or color. It has only been with the development of "affirmative action" that anyone has relied upon statistical and results-oriented evidence to conclusively satisfy constitutional and statutory civil rights provisions. In any event, there is absolutely no Court decision before or after *Mobile* in which anything less than purpose has been required to establish a violation of section 2, the Fifteenth Amendment, or any other Reconstruction amendment.[87]

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[86] 446 U.S. at 94, 102–3. (Justice White dissenting) The primary difference between Justice White's finding and that of Justice Stewart lay in the fact that Justice White found that the facts gave rise to an inference of discriminatory purpose, while Justice Steward did not. They did not disagree on the proper standard of proof itself—the intent standard.

Proponents of the results test are not only in conflict with the Court itself on the meaning of *White* but they are in conflict with several lower courts upon which they would like to rely for a definition of the results test. Proponents often rely upon a test articulated in the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), yet at the same time are explicit in rejecting one of the major factors involved in this test: "responsiveness of elected officials to minority community" which the House Report rejects as too "highly subjective". H.R. Rep. No. 97–227 at 30.

[87] 446 U.S. at 63.

Intent standard

The final criticism of the *Mobile* decision is that it establishes a requirement for identifying discrimination that is "impossible" or "extremely difficult" to satisfy.[88] This criticism greatly overstates the degree of difficulty of this test as well as the uniqueness of the test.

First, the subcommittee would observe that the intent or purpose standard has never proven "impossible" in a variety of other legal contexts. In the criminal law, for example, not only is there normally an intent requirement but such a state of mind must be proven "beyond a reasonable doubt". In the context of civil rights violations, it is only necessary that an inference of intent be raised "by a preponderance of the evidence", a vastly less stringent requirement.

In addition, the intent standard has traditionally been the standard for evidencing discrimination not only in the context of the Fifteenth Amendment, but also in the context of the Equal Protection Clause of the Fourteenth Amendment, the Thirteenth Amendment, and school busing cases. In *Washington* v. *Davis*, for example, the Supreme Court observed (in an opinion written by Justice White):

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race . . . our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact . . . a law establishing a racially neutral qualification is not racially discriminatory and does not deny equal protection of the laws simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.[89]

In a subsequent decision, the Court reaffirmed this standard (a standard which has never been contradicted in any decision of the Court under the civil rights amendments to the Constitution). In *Arlington Heights* v. *Metropolitan Housing Authority*, it observed:

> Proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause . . . the holding in *Davis* reaffirmed a principle well established in a variety of contexts e.g. *Keyes* v. *School District No. 1* 413 U.S. 189, 208 (schools); *Wright* v. *Rockefeller* 376 U.S. 52, 56–7 (election districting); *Akins* v. *Texas* 325 U.S. 398, 403–04 (jury selection). . . . The finding that a decision carried a discriminatory "ultimate effect" is without independent constitutional significance.[90]

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[88] See supra note 75.

[89] 426 U.S. 229, 239, 245 (1976). A footnote in *Washington* disapproving several lower court decisions did not include any voting cases. Id. at note 12. The requirement of discriminatory purpose far antedated *Washington* v. *Davis*, however. See, e.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practicably to make unjust and illegal discrimination between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution."); *Snowden* v. *Hughes* 321 U.S. 1, 8 (1944) ("The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.") The requirement of intent or purpose as a fundamental element of civil rights law is as old as the development of such law itself.

[90] *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 252, 265, 271 (1977). See also *Memphis* v. *Green*, 451 U.S. 100 (interpreting § 1981 of Title 42, a codification of the Thirteenth Amendment, to require purposeful discrimination.)

Still more recently, the Court again reviewed the meaning and purposes of the Fourteenth Amendment and the Equal Protection Clause in *Personnel Administrator of Massachusetts* v. *Feeney*.[91] In that decision, the Court stated:

> Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose . . . the settled rule is that the Fourteenth Amendment requires equal laws not equal results . . .[92]

The Court has also stated expressly that the intent standard is the appropriate standard for identifying discrimination in the area of school segregation. In *Keyes* v. *School District No. 1*, the Court noted:

> De jure segregation requires a current condition of segregation resulting from intentional State action . . . the differentiating factor between de jure and so-called de facto segregation . . . is purpose or intent to discrimination.[93]

In addition to the fact that intent or purpose is not an extraordinary test for discrimination, and the fact that it is proven every day of the week in thousands of courtrooms around the country in both criminal and civil litigation, it must also be observed that it has not proven an "impossible" test in the context of several major voting rights decisions that have been handed down under section 2 and the Fifteenth Amendment *since* the *Mobile* decision. In the recent cases of *McMillian* v. *Escambia County*[94] and *Lodge* v. *Buxton*,[95] the Fifth Circuit found no insurmountable difficulties in identifying voting discrimination under the intent standard.

In short, there is absolutely no need whatsoever under the intent test to find a "smoking gun" of evidence or to "mind read" or to discern the intentions of "long-dead legislators",[96] as is often alleged. It is this misunderstanding of the intent standard that is undoubt-

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[91] 442 U.S. 256 (1979).

[92] 442 U.S. at 272, 273. The *Feeney* case is also important in elaborating upon the idea of "discriminatory purpose." As the Court observed:

> "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences . . . It implies that the decision-maker selected or reaffirmed a particular course of action at least in part "because of" not merely "in spite of" its adverse consequences upon an identifiable group.

See also 442 U.S. at 279, note 25 in which the Court rejects the notion of intent or purpose being synonymous with the notion of the foreseeability of the disparate impact of an action, while at the same time recognizing this factor as simple evidence which may have a relevant bearing on the issue; Senate Hearings, February 2, 1982, Michael Levin, Professor, City College of New York.

[93] 413 U.S. 189, 205 (1973).

[94] 638 F.2d 1239 (5th Cir. 1981).

[95] 639 F.2d 1358 (5th Cir. 1981).

[96] While several witnesses have emphasized the point that throughout our judicial history, the courts have generally refused to examine the motives of legislators, what they do not emphasize is that throughout this same history the courts have also refused to look beyond the face of a statute to identify discrimination. There are few, if any, cases prior to *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) in which the Supreme Court struck down a statute which was not discriminatory on its face. It was in *Gomillion* and in dictum in *Lassiter County* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959) that the Court first began to suggest that a statute could be struck down because of discriminatory intent even though there was no discrimination on the face of a statute. See also *Palmer* v. *Thompson*, 403 U.S. 217 (1971). This, then, represented a significant advance for civil rights plaintiffs. Practices that had earlier been beyond attack because courts could not inquire into legislative motives could now be declared unconstitutional if a discriminatory motive could be demonstrated. Proponents of the effects test now want to take this development one step further. They want to strike down statutes that are not discriminatory on their face even where no intent to discriminate has been demonstrated. This is not a reversion to the old standard of refusing to look at intent but rather a perversion of the new exception to that standard which permits motive to taint an otherwise acceptable practice.

edly responsible for much of the suggestion that it is an unusually difficult test.

The subcommittee would like to note, moreover, that it is not persuaded that an appropriate standard should be fashioned on the basis of what best facilitates successful legal actions against states and municipalities. If that is the sole (or even the primary) objective of a legal system, then Congress might want equally to reconsider expediting criminal prosecutions by eliminating the "beyond a reasonable doubt" requirement in such cases. In developing an appropriate evidentiary and substantive standard, our society has chosen to consider values such as fairness and due process as well which, not infrequently, will conflict with the value of maximizing successful prosecution or litigation rates.

To describe the intent test as one requiring direct evidence of a "smoking gun" or admissions of racial prejudice and bigotry is to misconceive the test. In fact, as the Supreme Court observed in *Washington* v. *Davis*:

> Necessarily an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.[97]

In *Arlington Heights*, the Court stated:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.[98]

Among the specific factors that may be looked to by the courts in evidencing discrimination, according to *Arlington Heights*, are the historical background of an action, departures from normal procedural sequence, legislative or administrative history, the disparate impact of an action upon a minority, and the like.[99] As the Court noted, these are only a few of the circumstances that could properly be the subject of an inquiry under the intent test.[100]

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[97] 426 U.S. 229, 242 (1976).
[98] 429 U.S. 252, 266 (1977).
[99] Id. at 266–68.
[100] See, e.g., Simon, "Racially Prejudiced Government Action: A Motivation Theory of the Constitutional Ban Against Racial Discrimination," 15 San Diego Law Rev. 1041 (1978) at 1098 where the author discusses additional types of evidence from which the circumstantial inference of institutional motivation may be drawn:

> (1) overtly racial rules or regulations that may (a) be symptomatic of prejudice, (b) single out a minority racial group or groups for clear disadvantage, or (c) have neither of these racial characteristics, or share one or the other to some incomplete extent; (2) evidence that the action significantly disadvantages a member or members of a minority racial group relative to others within the relevant population; (3) an explanation of the purportedly innocent goals of the challenged action that is sufficiently contextually peculiar to warrant disbelief, (4) evidence that the action's purportedly innocent goals could have been accomplished by reasonably available alternative means with a significantly less racially disproportionate effect; (5) judicial or administrative decisions that assign race as one of the grounds of decision; (6) an institutional admission, as for example a preamble of legislation racially neutral on its face that recites a racial purpose or an admission by counsel representing the institution that took the challenged action; (7) evidence of a contextual peculiarity in the process that led to the challenged actions, as, for example, the omission of a required or customary hearing; (8) evidence that the specific membership institution has previously been found to have engaged in racially prejudiced actions; (9) evidence of a social political background or context suggestive of racial prejudice; (10) evidence of the data and arguments, whether by outsiders or members, presented to the institution during the information-gathering and deliberative processes that led to the action.

See also generally Ely, "Legislative and Administrative Motivation in Constitutional Law", 79 Yale L.J. 1205 (1970); Brest, "In Defense of the Anti-Discrimination Principle", 90 Harvard Law Rev. 1 (1976); Goodman, "De Facto School Desegregation: A Constitutional and Empirical Analysis", 60 California Law Rev. 275 (1972).

In short, it is expected that a judicial body will weigh the "totality of circumstances," whatever such circumstances may be, in evaluating whether or not an inference of purposeful discrimination has been raised. The same infinite array of circumstantial evidence commonly used by the courts to identify criminal violations, in the absence of confessions of guilt, has also always been available to prove civil rights violations.[101]

Professor Younger, one of the Nation's foremost authorities on the law of evidence, testified before this subcommittee and concluded:

> Opposition to the intent test has been practical. To enact it, the argument goes, is to make it difficult or even impossible to prove a violation. A practical objection to be sure but one which suggests to me that its makers lack practical experience in the conduct of litigation. Spend a few hours in any criminal court in the land. What is the stuff on trial? Almost always, a question of intent . . . In nearly all criminal litigation and in much civil litigation, a party must prove the other party's intent. So far as I know, except for the matter before this subcommittee, there has been no serious contention that it is an unduly difficult or impossible thing to do. On the contrary, the courts have worked up several rules to guide juries in ferreting out intent. Intent may be inferred from what X said for example but what X said does not conclude the inquiry: a jury may find that X's intention was the opposite of what was said. Or X's intent may be inferred from all the circumstances of his behaviour . . . Nowhere does the law of evidence require a "smoking gun" in the form of someone's express acknowledgement of the offending intent; and nowhere has the administration of justice been impeded by the nearly universal absence of such a smoking gun . . . Lawyers and judges are familiar with the intent test and juries have no particular trouble applying it.[102]

The subcommittee concludes that proving intent is not "easy"—it should not be "easy" for a Federal court judge to make findings that will result in the dismantlement of a structure of municipal self-government—but neither is it so difficult that it poses an insurmountable standard in section 2 cases. It is a standard that the Nation has always lived with in the area of civil rights, as well as other areas of the law, and it has often been satisfied in litigation. Most importantly, it is the *right* standard in the sense that neither an individual nor a community ought to be in violation of civil rights statutes, and ought not be considered guilty of discrimination, in the absence of intent or

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[101] See, e.g., Appellant's Reply Brief, Frank R. Parker, Lawyers' Committee for Civil Rights Under Law, *Kirksey* v. *City of Jackson*, No. 81–4058 (5th Cir. 1981) at 10:

> The absence of a 'smoking gun' in the 1908 legislative history does not, contrary to defendants' argument, negate the evidence of discriminatory purpose . . . and thus circumstantial evidence is highly probative.

Moreover, the brief cited as evidence of discriminatory purpose:

> (a) the extensive perception that blacks were a political threat throughout this period; (b) that at-large voting was viewed by at least one legislative leader who supported this legislation as a purposeful device to prevent black political participation; (c) the inevitable and foreseeable consequences of this legislation was to exclude black representation; (d) in fact, it has had this effect in Jackson; and (e) remarks by single legislators which, together with other supportive evidence of discriminatory intent, "have provided a firm basis for findings of invidious purpose in cases within this Circuit."

[102] Senate Hearings, February 25, 1982, Irving Younger, Williams and Connolly, Former Professor, Cornell University School of Law.

purpose to discriminate. To speak of "discrimination" in any other terms—to treat it as equivalent to a showing of disparate impact—is to transform the meaning of the concept beyond all recognition and to embark upon a course of conduct with consequences that may be at substantial variance with the traditional purposes of the Voting Rights Act and of the Constitution itself.

Rule of law

The subcommittee also believes that maintenance of the present intent test is critical if the law in section 2 is to provide any meaningful guidance to states and municipalities in the conduct of their affairs. As subcommittee Chairman Hatch remarked during the hearings:

> The more I think about it the more convinced that I am that the real distinction between the intent standard and the results standard is even greater than the issue of proportional representation. The real issue is whether or not we are going to define civil rights in this country by a clear, determinable standard—through the rule of law, as it were—or by a standard that literally no one can articulate.[103]

The fundamental observation is that the results test has absolutely no coherent or understandable meaning beyond the simple notion of proportional representation by race, however vehemently its proponents deny this. Ultimately, the results test brings to the law either an inflexible standard of proportional representation or, in the words of Benjamin Hooks of the NAACP (in describing discrimination under the results test):

> Like the Supreme Court Justice said about pornography, "I may not be able to define it but I know it when I see it." [104]

In the final analysis, that is precisely what discrimination boils down to under the results test because there is no ultimate standard for identifying discrimination, short of proportional representation.

Under the intent test, for example, judges or juries evaluate the totality of circumstances on the basis of whether or not such circumstances raise an inference of intent to discriminate. In other words, once they have been exposed to the full array of relevant evidence relating to an allegedly discriminatory action, the ultimate or threshold question is, "Does this evidence add up to an inference of intent to discriminate?" That is the standard by which evidence is evaluated in order to determine whether or not such evidence rises to a level sufficient to establish a violation.

Under the results test, however, there is no comparable question. Once the evidence is before the court—whether it be the totality of the circumstances or any other defined class of evidence—there is no logical threshold question by which the court can assess such evidence, short of whether or not there is proportional representation for minorities. As Professor Blumstein observed on this matter:

> The thing you must do under the intent standard is to draw a bottom line . . . Basically, is the rationale ultimately a

[103] Senate Hearings, January 28, 1982, Opening Statement, U.S. Senator Orrin G. Hatch.
[104] Senate Hearings, January 27, 1982, Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People.

> sham or a pretext or is it a legitimate neutral rationale? That is under the intent standard and that is a fact finding decision in the judge or the jury . . . Under the results standard it seems to me that you do not have to draw the bottom line. You just have to aggregate out a series of factors and the problem is, once you have aggregated out those factors: what do you have? Where are you? You know, it is the old thing we do in law school: you balance and you balance but ultimately how do you balance? What is the core value? [105]

There is no "core value" under the results test except for the value of equal electoral results for defined minority groups, or proportional representation. There is no other ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it.

While there have been a number of attempts to define such an ultimate, evaluative standard, more probing inquiry into the meaning of these standards during subcommittee hearings invariably degenerated into either increasingly explicit references to the numerical and statistical comparisons that are the tools of proportional representation/quota analysis or else the wholly uninstructive statements of the sort that "you know discrimination when you see it." [106]

The implications of this are not merely academic. In the absence of such standards, the results test affords virtually no guidance whatsoever to communities in evaluating the legality and constitutionality of their governmental arrangements (if they lack proportional representation) and it affords no guidance to courts in deciding suits (if there is a lack of proportional representation).[107]

Given the lack of proportional representation, as well as the existence of a single one of the countless "objective factors of discrimination," [108] the subcommittee believes not only that a prima facie case of discrimination would be established under the results test but that an irrebuttable case would be established. What response could a community that is being sued raise to overcome this evidence? Neither the fact that there was an absence of discriminatory purpose nor the fact that there were legitimate, non-discriminatory reasons for particular

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[105] Senate Hearings, February 12, 1982, James F. Blumstein, Professor, Vanderbilt University School of Law.

[106] See supra note 104. With respect to the Section 5 "effects" test there is at least an objective standard by which to judge the impact of changes upon minorities, i.e. the status quo ante. Thus the "retrogression" standard established in *Beer* has at least some meaning independent of proportional representation, whatever other difficulties there may be with this standard. 425 U.S. 130 (1976). When existing laws are evaluated, however—as opposed solely to changes in the law—as they would be under the Section 2 results test, there is no possibility of a similar standard to that suggested in *Beer*. In short, there is no standard short of comparing actual representation of minorities with the representation to which they would be "entitled" under a proportional representation requirement. See Senate Hearings, March 1, 1982, Assistant Attorney General of the United States for Civil Rights William Bradford Reynolds.

Professor O'Rourke has further observed:

> A challenge to an at-large system of necessity must be predicated on a comparison between electoral opportunity under the existing plan and the opportunity that would or might prevail under one or more alternatives. If the alternatives need not be limited to those which fit within the existing structure of government or the current size of the local governing body, then there is little to prevent the consideration of proportional representation as the model against which the current system could be evaluated. Statement submitted to the Subcommittee on the Constitution by Timothy O'Rourke, Professor, University of Virginia, March 3, 1982.

[107] As the Supreme Court in *Mobile* said in rejecting the results test proposed by Justice Marshall for the Fifteenth Amendment and Section 2,

> Mr. Justice Marshall's dissenting opinion would discard these fixed principles [of law] in favor of a judicial inventiveness that would go far toward making this Court a super-legislature. . . . We are not free to do so. 446 U.S. 55, 76.

[108] See note 130 infra.

governmental structures or institutions, would seem to be satisfactory. These were certainly not satisfactory to either plaintiffs or the lower courts in the *Mobile* case. What other evidence or what other response would be appropriate to rebut the evidence described here? So long as there is no standard for evaluating evidence, there can be no standard for introducing evidence. The standard that would be fashioned would necessarily be fashioned on a case-by-case basis. By necessity the results test would substitute the arbitrary discretion of judges in place of the relatively certain rule of law established under the intent test.

The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: Does the "results" test proposed in section 2 mean the same thing as the "effects" test in section 5? Despite the fundamental importance of this matter, there has been disagreement among witness after witness on this. Representative Sensenbrenner, one of the architects of the results test in the House, testified before this subcommittee and stated:

> I think that we are splitting hairs in attempting to see a significant difference in a results test or an effects test.[109]

Mr. Chambers, representing the NAACP Legal Defense Fund, on the other hand, totally disclaimed this meaning:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?
> Chambers: They are not the same test...
> Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
> Chambers: That is correct.[110]

Ms. Martinez, representing the Mexican-American Legal Defense and Education Fund, however, stated:

> The continuing vitality of section 2 depends upon an amendment passed by the House that would permit judicial findings of section 2 violations upon proof of the discriminatory effects *or* results of voting practices.[111]

Professor Cox found himself in disagreement on this point when he observed:

> If you mean the effects test as intepreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.[112]

During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results test in section 2 was similar or identical to the effects test in section 5, and hence that the judicial

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[109] Senate Hearings, February 4, 1982, U.S. Representative James Sensenbrenner.
[110] Senate Hearings, February 12, 1982, Julius L. Chambers, President, NAACP Legal Defense Fund, Inc.
[111] Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican American Legal Defense and Educational Fund.
[112] Senate Hearings, February 25, 1982, Archibald Cox, Professor, Harvard University School of Law, representing Common Cause.

history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar.[113] Given the inherent uncertainty about the results test in the first place, it is highly instructive to the subcommittee that so much continuing confusion could exist on a question as basic as the relationship between the section 2 results test and the section 5 effects test.

In summary, the subcommittee believes that it would be a grave mistake for Congress to overturn the decision of the Supreme Court in *City of Mobile* v. *Bolden*. Such an action would effect a major transformation in the law of section 2 and would overturn a workable and settled test for identifying discrimination. The results test in section 2 would bring to the Voting Rights Act an entirely new concept of civil rights that would create confusion in the law and, likely, leave thousands of communities across the country vulnerable to judicial restructuring.

B. PROPORTIONAL REPRESENTATION BY RACE

Perhaps the most important and disturbing issue brought to the attention of the subcommittee during the hearings was the issue of whether the proposed change in section 2 of the Voting Rights Act would lead to widespread court-ordered "proportional representation." Put simply, proportional representation refers to a plan of government which adopts the racial or ethnic group as the primary unit of political representation and apportions seats in electoral bodies according to the comparative numerical strength of these groups.[114] The concept of proportional representation has been experimented with—often accompanied by substantial social division and turmoil—in a handful of nations around the world.[115] There seems to be general agreement that the framers of our Federal Government rejected official recognition of interest groups as a basis for representation and instead chose the individual as the primary unit of government.[116] Hence, the subcommittee is deeply concerned with this issue since the proposed change in section 2 could have the consequence of bringing about a substantial change in the fundamental organization of American political society.

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[113] On occasion, there were even differences of opinion among the same witness in their testimony before the House and the Senate. See, e.g., testimony of Drew Days, Professor, Yale School of Law, Senate Hearings, February 12, 1982; House Hearings, June 25, 1981; Henry Marsh, Mayor, Richmond, Virginia, Senate Hearings, January 28, 1982, House Hearings, May 20, 1981.

[114] It is worth noting that there seems to be at least some semantical differences as to what "proportional representation" means. See, e.g., Senate Hearings, January 27, 1982, Benjamin Hooks, Executive Director, NAACP ("I think there is a big difference between proportional representation and representation in proportion to minority population."); Senate Hearings, February 12, 1982, Drew Days, Professor, Yale School of Law (denying that a Justice Department requirement amounted to proportional representation that required at least one district in a four district community, with a 25% minority population, be structured to elect a minority representative.) See also Senate Hearings, January 28, 1982, Henry Marsh, Mayor, Richmond, Virginia; February 11, 1982, Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law; in which fundamental disagreement was expressed on whether or not the *Richmond and Petersburg* cases involved proportional representation.

[115] Senate Hearings, February 12, 1982, Henry Abraham, Professor, University of Virginia.

[116] See, e.g., Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute; Berns, "Voting Rights and Wrong", Commentary, March 1982 at 31; See also The Federalist No. 10 in which James Madison discusses the concern of the drafters of the Constitution about the development of "factions" in the new Nation.

Results and proportionality

The analysis of this issue begins with the language of the proposed change in section 2. Existing section 2 provides that:

> No voting qualification or prerequisitive to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 4(f)(2).[117]

The House amendment eliminates the words "to deny or abridge" and substitutes the words "in a manner which results in a denial or abridgement of." The House Committee report explains that:

> H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under the provision.[118]

Under the current language, as construed by the Supreme Court in the *Mobile* case, a violation of section 2 requires proof of discriminatory purpose or intent. The House bill changes the gravamen of the claim to proof of a disparate electoral result. This change in the very essence of the claim filed under section 2 necessarily changes the remedial options of courts upon proof of a section 2 violation. In the present situation, a court can provide an adequate remedy merely by declaring the purposefully discriminatory action void since the essence of the statutory claim is a right to freedom from wrongfully motivated official action. However, under the proposed change in section 2, the right established is to a particular result and so, inevitably, much more will be required to provide an adequate remedy. The obligations of judges will require use of their equity powers to structure electoral systems to provide a result that will be responsive to the new right.[119] Otherwise, the new right would be without an effective remedy, a state of affairs which is logically and legally unacceptable.

Thus launched in search of a remedy involving results, the subcommittee believes that courts would have to solve the problem of measuring that remedy by distributional concepts of equity which are indistinguishable from the concept of proportionality. The numerical contribution of the group to the age-eligible voter group will almost certainly dictate an entitlement to office in similar proportion.[120] It is the opinion of the subcommittee that if the substantive nature of a sec-

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[117] Section 4(f)(2) includes within the category of groups protected under the Voting Rights Act "language minority" groups. Such "language minorities" are defined to include American Indians, Alaskan Natives, Asian Americans, and those of Spanish heritage. Section 14(c)(2).

[118] H.R. Rep. No. 97-227 at 29 (1981).

[119] The significance of this distinction was noted by Mr. Rios who described "two stages of litigation, that is, the proving your case part and then the remedy part." He testified further that "once the factors delineated in *Zimmer* and *White* have been established then the courts do require that you go to single-member districts but that is at the remedy stage." Senate Hearings, February 4, 1982, Rolando Rios, Legal Director, Southwest Voter Registration Education Project.

[120] For further discussion of the concept of racial "entitlements", see Senate Hearings, February 12, 1982, James Blumstein, Professor, Vanderbilt University School of Law. Professor Blumstein testified that the proposed change in Section 2, if theoretically based at all implies "an underlying theory of some affirmative, race-based entitlements." Later in his testimony, he characterized this theory as follows: "Basically, it changes the notion from a fair shake to a fair share, a piece of the action, based upon racial entitlements, and that is what I find objectionable."

tion 2 claim is changed to proof of a particular electoral result, the obligation of judges to furnish adequate remedies according to basic principles of equity will lead to widespread establishment of proportional representation.

Virtually the same conclusion was stated by numerous witnesses who appeared before the subcommittee. Attorney General Smith told the subcommittee:

> [Under the new test] any voting law or procedure in the country which produces election results that fail to mirror the population's make-up in a particular community would be vulnerable to legal challenge . . . if carried to its logical conclusion, proportional representation or quotas would be the end result.[121]

Assistant Attorney General Reynolds testified:

> A very real prospect is that this amendment could well lead on to the use of quotas in the electoral process . . . We are deeply concerned that this language will be construed to require governmental units to present compelling justification for any voting system which does not lead to proportional representation.[122]

Professor Horowitz testified that under the results test:

> What the courts are going to have to do is to look at the proportion of minority voters in a given locality and look at the proportion of minority representatives in a given locality. That is where they will begin their inquiry; that is very likely where they will end their inquiry, and when they do that, we will have ethnic or racial proportionality.[123]

Professor Bishop has written the subcommittee:

> It seems to me that the intent of the amendment is to ensure that blacks or members of other minority groups are ensured proportional representation. If, for example, blacks are 20 per cent of the population of a state, Hispanics 15 per cent, and Indians 2 per cent, then at least 20 per cent of the members of the legislature must be black, 15 per cent Hispanic, and 2 per cent Indian.[124]

Professor Abraham has stated:

> Only those who live in a dream world can fail to perceive the basic purpose and thrust and inevitable result of the new section 2: It is to establish a pattern of proportional representation, now based upon race—but who is to say, sir?—perhaps at a later moment in time upon gender, or religion, or nationality, or even age.[125]

A similar conclusion—that the concept of proportional representation of race is the inevitable result of the change in section 2—was

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[121] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.

[122] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[123] Senate Hearings, February 12, 1982, Donald Horowitz, Professor, Duke University School of Law.

[124] Letter from Joseph Bishop, Jr., Professor, Yale School of Law, to Senator Orrin G. Hatch, Chairman, Senate Judiciary Subcommittee on the Constitution, January 21, 1982.

[125] Senate Hearings, February 12, 1982, Henry Abraham, Professor, University of Virginia. For other selected quotes on Section 2 and proportional representation, see Attachment B.

reached by a large number of additional witnesses and observers. (See Attachment B.)

The disclaimer provision

Proponents of the House change in section 2 have argued that the amendment would not result in proportional representation, and generally relied on the "disclaimer" sentence which was added to section 2 as a part of the House bill.[126] Since this is the chief argument contrary to the conclusion of the subcommittee, the likely effect of this provision merits careful attention. Again, the analysis begins with the language of the provision:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, *in and of itself*, constitute a violation of this section. (Emphasis added.)

The House report comments on this change as follows:

> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself constitute a violation of the section although such proof, along with the objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.[127]

This report language is frequently cited as explaining the protection afforded by the disclaimer language of the House amendment.[128] Analysis of the House report language shows that it is a misleading and irrelevant comment on the likely effect of the statutory reference to proportionality. Moreover, the subcommittee notes that courts would look first to the language of section 2 itself in resolving concerns about proportional representation and would only consult legislative history if the statutory language were found to be ambiguous.

The House Report reference to no "right of proportional representation" is highly misleading because, as explained above, the change in section 2 actually creates a new claim to non-disparate election results among racial groups.[129] The inevitability of proportional representa-

[126] See, e.g., Senate Hearings, February 25, 1982, Archibald Cox, Professor, Harvard University Law School, representing Common Cause; February 25, 1982, David Brink, President, American Bar Association; February 4, 1982, U.S. Representative James Sensenbrenner.

[127] H.R. Rep. No. 97–227 at 30 (1981).

[128] The Supreme Court in *Mobile* was confronted with a similar disclaimer of proportional representation by Justice Marshall in his dissent. In response, the Court observed.

> The dissenting opinion seeks to disclaim this description of its theory [results test] by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical and social" factors indicating that the group in question is without political influence . . . Putting to the side the evident fact these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete political group that happens for whatever reason to elect fewer of its candidates than arithmetic indicates it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the inequitable distribution of political influence, 446 U.S. 75, n.22.

[129] As Professor Gross observed:

> The Constitution speaks only of individuals. There are many theories of political representation . . . but only one of these is enacted in the Constitution. Senate Hearings, January 28, 1982, Barry Gross, Professor, City College of New York.

The concept of a "diluted" vote, a concept much admired among proponents of the results test, is one that has meaning only in the context of interest groups. The Equal Protection clause of the Fourteenth Amendment as well as the Fifteenth Amendment extend their protections expressly to individuals, not to groups.

tion is introduced by the necessity of fashioning an adequate remedy, to respond to the new claim. The statement in the House Report, "Neither does it create a right to proportional representation as a remedy" is basically irrelevant to the predicted remedial consequence of proportional representation since there is no suggestion that this consequence is prohibited by the disclaimer. In other words, though proportional representation may not be a mandatory remedy, even under this theory nothing suggests that it is a prohibited remedy.

The subcommittee believes that the second sentence of the report language on the disclaimer may be an accurate observation, but is essentially an irrelevant one. The disclaimer provision will have virtually no practical significance in preventing the ultimate imposition of proportional representation. In short, the disclaimer merely adds the necessity of proving, as an element of the new section 2 claim, one or more "objective factors of discrimination" that purport to explain or illuminate the failure to elect in numbers equal to the group's proportion of the population. The subcommittee finds this addition totally illusory as a bar to proportional representation since the courts and the Justice Department in the context of section 5 and elsewhere have already identified so many such factors that one or more would be available to fully establish a section 2 claim in virtually any political subdivision having an identifiable minority group.

A partial list of these "objective factors," [130] gleaned from various sources, includes (1) some history of discrimination; [131] (2) at-large voting systems or multi-member districts; [132] (3) some history of "dual" school systems; [133] (4) cancellation of registration for failure to vote; [134] (5) residency requirements for voters; [135] (6) spe-

[130] From the perspective of the proponents of the results test, an "objective factor of discrimination" is an electoral practice or procedure which constitutes a barrier to effective minority participation in the political process. These factors are derived generally from decisions of federal courts, objections of the Department of Justice to proposed changes submitted by covered jurisdictions for preclearance under Section 5, the House Report, H.R. Rep. No. 97–227 at 30 (1981), testimony presented at the Senate hearings, and other miscellaneous sources.

[131] See, e.g., H.R. Rep. No. 97–227, 97th Cong., 1st Sess. 30–31 (1981), (hereinafter in this section "House Report"); Senate Hearings, January 27, 1982, Benjamin L. Hooks, Executive Director N.A.A.C.P.; See also, *Gaston County* v. *United States*, 395 U.S. 285, 296–7 (1969). Discrimination against blacks (and perhaps other minorities) has been prevalent throughout the United States and the existence of such discrimination, although going back many generations before, will nevertheless be used as the predicate for broad, far-reaching relief under any law using disparate or discriminatory impact as a test." Senate Hearings, February 4, 1982, E. Freeman Leverett, Attorney, Elberton, Georgia.

[132] See, e g., House Report at 30–31: This was the argument of the plaintiffs in *City of Mobile* v. *Bolden*, 446 U.S. 55, 65–70 (1980).

The Justice Department has routinely objected to at-large voting systems contained in Section 5 preclearance submissions: e.g. Twiggs County, Georgia (8–7–72); State of Mississippi (5–21–69); Hale County, Alabama (4–23–76); Lexington, Mississippi (2–25–77); Robeson County (N.C.) Board of Education (12–29–75); Horry County, South Carolina (11–12–76) Senate Hearings, March 1, 1982, William Bradford Reynolds, Assistant Attorney General of the United States (Attachments D–1 and D–2); see also, Senate Hearings, January 27, 1982, Benjamin L. Hooks. It is interesting to note that such "objective factors of discrimination" as the at-large system of voting have been attacked even in the context of situations in which "minorities" represent population majorities within a community, e.g. San Antonio, Texas. See Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund.

[133] See, e.g., *Commonwealth of Virginia* v. *United States*, 386 F. Supp. 1319 (D.D.C. 1974) *affirmed*, 420 U.S. 90 (1975).

[134] See, e.g., House Report at 21 n. 105; Senate Hearings, January 27, 1982, Benjamin L. Hooks; "Barriers to Effective Participation in Electoral Politics", Voter Education Project Report, at 2 (March 1981). The Justice Department has objected to voter purging provisions in Section 5 submissions; e.g. State of Mississippi (4–6–81); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachment D–2).

[135] See, e.g., House Report at 30–31: The Justice Department has often objected to residency requirements contained in Section 5 preclearance submissions: e.g. Bogalusa, Louisiana (10–29–73); Walterboro, South Carolina (5–24–74); Pike County, Alabama (8–12–74); Sharon, Georgia (2–10–76); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D–1 and D–2).

cial requirements for independent or third-party candidates;[136] (7) off-year elections;[137] (8) substantial candidate cost requirements;[138] (9) staggered terms of office;[139] (10) high economic costs associated with registration;[140] (11) disparity in voter registration by race;[141] (12) history of lack of proportional representation;[142] (13) disparity in literacy rates by race;[143] (14) evidence of racial bloc voting;[144] (15) history of English-only ballots;[145] (16) history of poll taxes;[146] (17) disparity in distribution of services by race;[147] (18) numbered electoral posts;[148] (19) prohibitions on single-shot voting;[149] and (20) majority vote requirements.[150]

Such "objective factors of discrimination" largely consist of electoral procedures or mechanisms that purportedly pose barriers to full participation by minorities in the electoral process. Given the existence of one or more of these factors with the lack of proportional representation, the new test in section 2 operates on the premise that the existence of the "objective factor" *explains* the lack of proportional representation. Thus, in a technical sense, the disclaimer would

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[136] See, e.g., *Allen* v. *State Board of Elections*, 393 U.S. 544, 570 (1969).

[137] The Justice Department has objected, for example, to special elections in preclearance submissions on six occasions, Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachment E–2). It might similarly be argued that "off-year" elections tend to result in disproportionately low voter turn-out among minorities.

[138] See, e.g., Senate Hearings January 27, 1982, Benjamin L. Hooks; Voter Education Project Report, "Barriers" at 3 (March 1981). The Justice Department has objected to filing fees in Section 5 submissions; e.g. Ocilla, Georgia filing fees for aldermen or mayor (10–7–75); Albany, Georgia filing fee (12–7–73); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D–1 and D–2).

[139] See, e.g., Senate Hearings, January 27, 1982, Benjamin L. Hooks. The Justice Department has objected to staggered terms in Section 5 preclearance submissions on numerous occasions: e.g., Phenix City, Alabama (12–12–75); St. Helena Parish, Louisiana (3–7–72); Newnan, Georgia (6–10–75); Reidsville, North Carolina (8–3–79); Gretna, Virginia (9–27–79); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D–1 and D–2).

[140] See, e.g., Senate Hearings, January 27, 1982, Benjamin Hooks—"Whether the polling places are accessible to the communities where the minorities reside, and times convenient for the voters". The Justice Department has objected to polling place changes contained in Section 5 preclearance submissions: e.g., Sumter County, Alabama (10–17–80); Newport News, Virginia (5–17–74); New York City, New York (9–3–74); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D–1 and D–2).

[141] See, e.g., Voting Rights Act of 1965, § 4(b), 42 U.S.C. § 1973b(b). See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

[142] See, e.g., House Report at 30–31; *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

[143] See, e.g., Voting Rights Act of 1965, § 4(a), 42 U.S.C. § 1973b(a); *Gaston County* v. *United States*, 395 U.S. 285 (1969).

[144] See, e.g., House Report at 30–31; *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *City of Rome* v. *United States*, 446 U.S. 156 (1980), Senate Hearings, Jan. 27, 1982, Benjamin L. Hooks; Voter Education Project Report, "Barriers" at 5 (March, 1981).

[145] See e.g., Voting Rights Act of 1965, § 203, 42 U.S.C. § 1973(n)(b)(f). The Justice Department has objected to "English-only ballots" in Yuba County (5–26–76) and Monterey County, California (3–4–77). Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachment D–2).

[146] See, e.g., Voting Rights Act of 1965, § 10, 42 U.S.C. § 1973h.

[147] See, e.g., *City of Rome* v. *United States*, 446 U.S. 156 (1980); *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir 1981); Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

[148] See, e.g., House Report at 30–31. The Justice Department has consistently objected to "numbered electoral posts" in Section 5 preclearance submissions: e.g., Birmingham, Alabama (7–9–71); the States of Georgia (7–6–81), Louisiana (4–20–73), Mississippi (9–10–71), North Carolina (9–27–71), South Carolina (6–30–72); and Texas City, Texas (3–10–76). Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments, D–1 and D–2); Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

[149] See, e.g., House Report at 30–31. The Justice Department has on occasion objected to "single-shot prohibitions" in Section 5 preclearance submissions: e.g., Talladega, Alabama (7–31–71); Sumter Cnty. (Ala.) Democratic Executive Committee (10–29–74). Senate Hearings, March 1, 1982, William Bradford Reynolds, (Attachments D–1); *City of Rome* v. *United States*, 446 U.S. 156, 184 n.19 (1980); U.S. Commission on Civil Rights, "The Voting Rights Act; Ten Years After" pp. 206–207 (1975); Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

[150] See, e.g., House Report at 30–31. The Justice Department has routinely objected to "majority vote requirements" in Section 5 preclearance submissions: e.g., Pike County, Alabama (8–12–74); Athens, Ga. (10–23–75), Augusta, Ga. (3–2–81); Orleans Parish, La. (8–15–75); State of Mississippi (6–11–79); Greenville, N.C. (4–7–80); Rock Hill, S.C. (12–12–78); Dumas (TX) Independent School District (3–12–76). Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments, D–1 and D–2). See Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

be satisfied. It would not be the absence of proportional representation *in and of itself* that would constitute the dispositive element of the violation but rather the "objective factor". The existence of both the absence of proportional representation and any "objective factor" would consummate a section 2 violation. Because of the limitless number of "objective factors of discrimination," the disclaimer provision would essentially be nullified. Effectively, any jurisdiction with a significant minority population that lacked proportional representation would run afoul of the results test. Identifying a further "objective factor of discrimination" would be largely mechanical and perfunctory.

The analysis of the subcommittee of the likely significance of the disclaimer sentence, in fact, accords it more weight than suggested by several opponents of the change who appeared before the subcommittee. Their views are not rejected, but are recognized as lending important support to the conclusion of the subcommittee.

Assistant Attorney General Reynolds testified, for example, that the disclaimer would only operate to prevent a violation of section 2 where an electoral system had, in fact, been tailored to achieve proportional representation and the intended result was not achieved *solely* because the right was not exercised as, for example, where no minority candidate sought office.[151] This reasoning led Assistant Attorney General Reynolds to conclude that in most situations a failure to achieve proportional representation by itself would be sufficient proof of a section 2 violation:

> In the archetypal case—where minority-backed candidates unsuccessfully seek office under electoral systems, such as at-large systems, that have not been neatly designed to produce proportional representation—disproportionate electoral results would lead to invalidation of the system under section 2, and, in turn, to a Federal court order restructuring the challenged government system.[152]

Professor Younger testified that the disclaimer is likely to be wholly ineffective because it is "simply incoherent." [153] He observed:

> If the draftsmen of proposed section 2 wished to see to it that the racial makeup of an elected body would not be taken as evidence of a violation, they have failed to say so in their moving sentence. If enacted, that saving sentence will either be rewritten by the courts or ignored, in either event dishonoring Congress' responsibility to write the Nation's laws.[154]

Professor Berns testified that the disclaimer might simply be ignored and stated:

> Whatever Congress' intention in making this disclaimer, the courts are likely to treat it the way they treated a similar disclaimer in the Civil Rights Act of 1964. There Congress said specifically that nothing in Title VII of that Act should

[151] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.
[152] Id.
[153] Senate Hearings, February 25, 1982, Irving Younger, Williams and Connally, Former Professor, Cornell University School of Law.
[154] Id.

> be interpreted to require employers "to grant preferential treatment" to any person or group because of race, color, sex, or national origin, not even to correct "an imbalance which may exist with respect to the total number of percentage of persons of any race etc. employed by any employer. Clear enough, one would think, but the Supreme Court paid it no heed. To read this as written, said Justice Brennan in the *Weber* case, would bring about an end completely at variance with the statute, by which he meant the purpose of the Court. Congress' disclaimer should be taken with a grain of salt.[155]

By whatever theory one prefers, the disclaimer is little more than a rhetorical smokescreen that poses utterly no barrier to the development of proportional representation mandated by the preceding language in the new results test.

To summarize once more, the disclaimer provision is meaningless as a barrier to proportional representation because: (a) it is absolutely silent in addressing the remedies, as opposed to the substantive violation, required by the results test; (b) even with respect to the substantive violation, the language taken at its face value simply requires the identification of an additional "objective factor of discrimination," one or more of which will exist in most jurisdictions throughout the country; (c) the provision can equally be interpreted to place an absolute obligation upon a jurisdiction to establish governmental structures consistent with proportional representation, offering protection to such jurisdictions only to the extent that minority groups themselves have been derelict in taking advantage of such a structure as, for example, when they fail to offer a candidate; (d) the provision from a purely technical point of view is inherently illogical and internally inconsistent since by the terms of section 2 only "voting practices or procedures" can be violations not, by definition, the *racial make-up* of an elected body; and (e) the provision, even if it meant what its proponents argue it means, is uncomfortably close in language to disclaimers in earlier legislation that has been effectively ignored by the courts.

Proportional representation as public policy

The conclusion of the subcommittee that proportional representation is the inevitable result of the proposed change in section 2, notwithstanding the disclaimer, leads the inquiry to whether the adoption of such a system would be advisable policy. On this point, the testimony was virtually unanimous in conclusion: Proportional representation is contrary to our political tradition and ought not to be accepted as a general part of our system of government at any level.[156] Professor Berns, for example, indicated that the Framers considered

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[155] Berns, "Voting Rights and Wrongs." Commentary, March 1982 at 35. "*Weber*" refers to *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). The disclaimer is illusory in yet another sense in that it does nothing more than restate what is already present law. *Whitcomb* v. *Chavis*, 403 U.S. 124, 149, (1971); *White* v. *Regester*, 412 U.S. 755, 765 (1973); *City of Mobile* v. *Bolden* 446 U.S. 55, 66 (1980); *Lodge* v. *Buxton*, 639 F. 2d 1358, 1362 (5th Cir. 1981), stay granted sub nom *Rogers* v. *Lodge*, 439 U.S. 948 (1978). In that sense, it does not address at all the impact and implications of that part of Section 2 that *is* being changed—the results test. The very fact that Congress will have changed the standard of Section 2 evidences an obvious intent on the part of Congress to change current law.

[156] See e.g., Senate Hearings, February 4, 1982, Norman Dorsen, Professor, New York University School of Law, representing the American Civil Liberties Union: "I would be against proportional representation. I think that people are entitled to vote under a fair and constitutional system and that proportional representation has not been our system."; Senate Hearings, February 12, 1982, Julius Chambers, President, NAACP Legal Defense Fund, Inc.

the very question the subcommittee has addressed and rejected any system of representation based on interest groups. He testified:

> Representative government does not imply proportional representation, or any version of it that is likely to enhance bloc voting by discrete groups. The Framers of the Constitution referred to such groups as "factions," and they did their best to minimize their influence." . . .
>
> Whereas the Anti-Federalists called for small districts and, therefore, many representatives, the Framers called for (and got) larger districts and fewer representatives. They did so as a means of encompassing within each district "a greater variety of parties and interests," thus freeing the elected representatives from an excessive dependence on the unrefined and narrow views that are likely to be expressed by particular groups of their constituents.[157]

The testimony of Professor Erler sounded the same theme:

> Nothing could be more alien to the American political tradition than the idea of proportional representation. Proportional representation makes it impossible for the representative process to find a common ground that transcends factionalized interests. Every modern government based on the proportional system is highly fragmented and unstable. The genius of the American system is that it requires factions and interests to take an enlarged view of their own welfare, to see, as it were, their own interests through the filter of the common good. In the American system, because of its fluid electoral alignments, a representative must represent not only interests that elect him, but those who vote against him as well. That is to say, he must represent the common interest rather than any particular or narrow interest. This is the genius of a diverse country whose very electoral institutions—particularly the political party structure—militate against the idea of proportional representation. Proportional representation brings narrow, particularized interests to the fore and undermines the necessity of compromise in the interest of the common good.[158]

The subcommittee adopts these views and believes that proportional representation ought to be rejected as undesirable public policy totally apart from the constitutional difficulties that it raises, and the racial consciousness that it fosters. Since it has concluded that the proposed change in section 2 will inevitably lead to the proportional representation and that the disclaimer language will not prevent this result, the subcommittee necessarily and firmly concludes that the House amendment to section 2 should be rejected by this body.

C. RACIAL IMPLICATIONS

In addition to the serious questions inherent in adopting any legislation which recognizes interest groups as a primary unit of political

[157] Senate Hearings, Janauary 27, 1982. Walter Berns, Resident Scholar, American Enterprise Institute.

[158] Senate Hearings, January 28, 1982. Edward Erler, Professor, National Humanities Center.

representation, it must be taken into account that the particular group immediately involved is defined solely on racial grounds. The subcommittee believes special caution is appropriate when the enactment of any race-based classification is contemplated and rigorous analysis of potential undesirable social consequences must be undertaken.

The first problem encountered is simply one of definition. Legislation which tends to establish representation based on racial group necessarily poses the question of how persons shall be assigned to or excluded from that group for political purposes. Recent history in this and other nations suggests that the resolution of such a question can be demeaning and ultimately dehumanizing for those involved. All too often the task of racial classification in and of itself has resulted in social turmoil. At a minimum, the issue of classification would heighten race-consciousness and contribute to race-polarization. As Professor Van Alstyne put it, the proposed change in section 2 will inevitably: "compel the worst tendencies toward race-based allegiances and divisions." [159] This predicted result is in sharp conflict with the admonitions of the elder Justice Harlan who wrote in *Plessy:*

> There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights are guaranteed by the supreme law of the land are involved.[160]

More recently Justice Stevens called the very attempt to define qualifying racial characteristics:

> repugnant to our constitutional ideals . . . If the national government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . .[161]

Thus the subcommittee finds that the race-based assignment of citizens to political groups is a potentially disruptive task which appears to be contrary to the Nation's most enlightened concepts of individual dignity and civil rights.

The second problem involves doubtful assumptions which are necessary to support a race-based system of representation. The acceptance of a racial group as a political unit implies, for one thing, that race is the predominant determinant of political preference. Yet, there is considerable evidence that black political figures can win substantial support from white voters, and, similarly, that white candidates can win the votes of black citizens. Attorney General Smith described the evidence. He referred to the implication that blacks will only vote for black candidates and whites only for white candidates and said:

> That, of course, is not true. One of the best examples of that is the City of Los Angeles, where a black mayor of course was elected with many white votes.[162]

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[159] Letter from William Van Alstyne, Professor, Duke University School of Law, Visiting Professor, University of California School of Law, to George Cochran, Professor, University of Mississippi School of Law, February 16, 1982; submitted to the Senate Subcommittee on the Constitution, February 25, 1982.

[160] *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1897) (dissenting opinion by Harlan, J.).

[161] *Fullilove* v. *Klutznick*, 448 U.S. 448, 534 n. 5 (1980) (dissenting opinion by Stevens, J.).

[162] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.

Similarly, a race-based system implies that the decisions of elected officials are predominantly determined by racial classification. Professor Berns questioned this assumption in his testimony:

> I question whether a black can be fairly represented only by a black and not, for example, by a Peter Rodino or that a white can be fairly represented only by a white and not, for example, Edward Brooke.[163]

In other words, there is no evidence that racial bloc voting is inevitable and reason to doubt that fair representation depends on racial identity. Legislation which assumes the contrary may itself have the detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials.

Finally, any assumption that a race-based system will enhance the political influence of minorities is open to considerable debate. Professor Erler testified that it is not always clear that the interests of racial minorities will be best served by a proportional system:

> It may only allow the racial minority to become isolated. The interests of minorities are best served when narrow racial issues are subsumed within a larger political context where race does not define political interests. The overwhelming purpose of the Voting Rights Act was to create these conditions, and probably no finer example of legislation serving the common interest can be found. But transforming the Voting Rights Act into a vehicle of proportional representatation based upon race will undermine the ground of the common good upon which it rests. Such a transformation will go far towards precluding the possibility of ever creating a common interest or common ground that transcends racial class considerations.[164]

Professor McManus recalled an instance where politically articulate blacks argued strongly against proportional representation:

> One faction of blacks, led by several state representatives, the three black Houston City Council members, argued for spreading influence among three commissioners rather than having a single black 'figurehead' commissioner. State Representative Craig Washington, spokesperson for the group, pointed out that three votes are needed to accomplish anything substantive. "As long as we have 25 percent of the vote in any one district we are going to be the balance of power. For that reason it is better for the black community to have voting impact on three commissioners than to be lumped together in one precinct and elect a black to sit at the table and watch the papers fly up and down," he said. Washington

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[163] Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute.

[164] Senate Hearings, February 12, 1982, Edward Erler, Professor, National Humanities Center. Even Justice Brennan, certainly no opponent of affirmative action notions of civil rights, has remarked that efforts to achieve proportional representation could be used as a "contrivance to segregate the group . . . thereby frustrating its potentially successful efforts at coalition building along racial lines." *United Jewish Organization* v. *Carey*, 430 U.S. 144 172–3. (1976).

argued that packing all the blacks in one district was "not in the best long-term interests of the community." [165]

The City Attorney for Rome, Georgia, Mr. Brinson similarly observed:

> While the proposed amendment to section 2 may be perceived as an effort to achieve proportional representation aimed at aiding a group's participation in the political processes, in reality it may very well frustrate the group's potentially successful efforts at coalition building across racial lines. The requirement of a quota of racial political success would tend strongly to stigmatize minorities, departmentalize the electorate, reinforce any arguable bloc voting syndrome, and prevent minority members from exercising influence on the political system beyond the bounds of their quota.[166]

A third problem relates to the perpetuation of segregated residential patterns. Since our electoral system is established within geographic parameters, the prescription of race-based proportional representation means that minority group members will indirectly be encouraged to reside in the same areas in order to remain in the race-based political group. A political premium would be put on segregated neighborhoods. Professor Berns used the term "ghettoization" to describe this process. "If we are going to ghetto-ize, which in a sense is what we are doing, with respect to some groups, why not do it for all groups?" [167] Professor McManus emphasized in her testimony that administrative practices in the context of section 5 seemed to encourage such segregation:

> A premium is put on identifying racially homogeneous precincts and using that as the test, and it seems to me the bottom-line inference is that racial polarization, or having people in racially-segregated precincts, is the optimal solution or the ideal, which I find very hard to accept as a citizen.[168]

The subcommittee rejects the premise that proportional representation systems in fact enhance minority influence (as opposed to minority representation). Even, however, to the extent that this were a valid premise, it would be valid only with respect to highly segregated minority groups. Indeed, proportional representation systems would place a premium upon the maintenance of such segregation. For to the extent that a minority group succeeded in integrating itself on a geographical basis, it would concomitantly lose the "benefits" of a ward-system of voting. Such a system would "benefit" minori-

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[165] Senate Hearings, February 1, 1982, Susan McManus, Professor, University of Houston. The subcommittee draws a sharp distinction between aggregate influence of the minority community generally and the influence of individual minority representatives. While the influence of an individual minority representative may wel lbe enhanced by an overwhelmingly concentrated minority district, it is questionable whether or not minority influence generally is enhanced by such districts as opposed, for example, to greater dispersal of significant minority populations among a greater number of districts. A distinction, thus, must be drawn between minority influence and minority representation.

[166] Senate Hearings, February 11. 1982, Robert Brinson, City Attorney, Rome, Georgia.

[167] Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute.

[168] Senate Hearings, February 1, 1982, Susan McManus, Professor, University of Houston.

ties only insofar as residential segregation were maintained for such groups.

Thus, analysis suggests that the proposed change in section 2 involves a distasteful question of racial classification, involves several doubtful assumptions about the relationship between race and political behavior, and may encourage patterns of segregation that are contrary to prudent public policy. These likely undesirable social consequences argue strongly against the proposed change in section 2.

D. IMPACT OF RESULTS TEST

Assistant Attorney General Reynolds emphasized in his testimony before the subcommittee that the proposed change in section 2 would apply *nationwide*, would apply to *existing* laws and would be a *permanent* provision of the Act. These observations cogently establish the parameters for assessing the practical impact of the proposed change in section 2.[169]

Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of section 2. It is important to emphasize at the outset that for purposes of section 2, the term "political subdivision" encompasses *all* governmental units, including city and county councils, school boards, judicial districts, utility districts, as well as state legislatures. All practices and procedures in use on the effective date of the change in the law would be subject to the new test, as well as any subsequently adopted changes in practices or procedures. Furthemore, since the provision would be permanent, a political subdivision which was not in violation of section 2 on the effective date of the proposed amendment, and which made no changes in its electoral system, could at some subsequent date find itself in violation of section 2 because of new local conditions which may not now be contemplated and which may beyond the effective control of the subdivision.[170]

Within these general and far reaching parameters,[171] it appears that any political subdivision which has a significant racial or language

[169] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[170] Section 5 of the Voting Rights Act, of course, applies only to proposed changes in voting practices and procedures. It does not apply to practices and procedures in effect at the time a jurisdiction becomes covered. Hence, the implications of the proposed change in section 2 are of critical importance for covered jurisdictions as well as non-covered jurisdictions.

[171] One witness' remarks are eloquent in capturing a sense of the potential breadth of the amendments to Section 2:

> It is no overstatement to say that the effect of the amendment is revolutionary, and will place in doubt the validity of political bodies and the election codes of many states in all parts of the Union . . . The amendment to Section 2 will likely have these consequences: (1) It will preclude any meaningful annexation by municipalities, government consolidations, county consolidations, or other similar governmental reorganizations in areas having a minority population . . . (2) It will outlaw at-large voting in any area where any racial, color, or language minority is found . . . (3) It will place in doubt state laws governing qualifications and educational requirements for public office . . . (4) It will dramatically affect State laws establishing congressional districts, state legislative districts, and local governing body apportionment or districting schemes; and (5) It will place in doubt provisions of many election codes throughout the United States. Senate Hearings, February 4, 1982, E. Freeman Leverett, Attorney, Elberton, Georgia.

These observations are not at significant variance with the observations of a large number of additional witnesses concerned about the change in section 2. To capture further a sense of the potential breadth of the section 2 change, imagine the implications of a State legislature's decision *not* to reduce the minimum voting age in state elections to 16, for example, or to *increase* such age after having voted a reduction. In each case, there would be a clear disparate impact upon racial minorities because of the substantially lower, average age of this population. In each case, a substantially higher proportion of minorities would be effectively "disenfranchised." See Senate Hearings, February 4, 1982, Norman Dorsen, Professor, New York University School of Law, representing the American Civil Liberties Union February 12, 1982, Julius Chambers, President, NAACP Legal Defense Fund, Inc.

minority population and which has not achieved proportional representation by race or language group would be in jeopardy of a section 2 violation under the proposed results test. If any one or more of a number of additional "objective factors of discrimination" [172] were present, a violation is likely and court-ordered restructuring of the electoral system almost certain to follow.

The probable nature of such an order is illustrated by the action of the District Court in the *Mobile* case.[173] At the time the action was brought, the City of Mobile, Alabama had a City Commission form of government which had been established in 1911. Three Commissioners elected at large exercised legislative, executive and administrative power in the city. One of the Commissioners was designated mayor, although no particular duties were specified. The judgment of the District Court disestablished the City Commission and a new form of municipal government was substituted consisting of a Mayor and a nine member City Council with members elected from nine single member wards or districts. The fact that Mobile had not established its system for discriminatory purposes, as well as the fact that clear, nonracial justification existed for the at-large system was considered largely irrelevant by the lower court. Thus, virtually none of the original governmental system remained after dismantling by the District Court. The conflict between the District Court's *Mobile* decision and fundamental notions of democratic self-government is obvious. Particularly noteworthy is the District Court's finding that blacks registered and voted in the city without hindrance. Notwithstanding this finding, however, the Federal court disestablished the governmental system chosen by the citizens of Mobile, thereby substituting its own judgment for that of the people.

The purpose of this section is to explore the far-reaching implications of overturning the *Mobile* decision. Research conducted by the subcommittee suggests that in a large number of states there exists some combination of a lack of proportional representation in the state legislature or other governmental bodies and at least one additional "objective factor of discrimination" which might well trigger, under the results test, Federal court-ordered restructuring of those electoral systems where the critical combination occurs.

> *The subcommittee has endeavored to consult the best available sources. It should be noted that information of this kind is subject to change. The objective of the subcommittee in presenting this information is only to illustrate the potential impact of a results test.*

State legislatures

There appears to be a lack of proportional representation in one or both houses of the state legislatures in the following states with significant minority populations: [174] Alabama, Alaska, Arizona, Arkan-

[172] The House Report on H.R. 3112 refers to these as being "objective factors of discrimination". H.R. Rep. No. 97-227. The Voter Education Project describes these as "barriers to minority participation." Hudlin and Brimah, The Voter Education Report: Barriers to Effective Participation in Electoral Politics (March 1981).

[173] 423 F. Supp. 384 (S.D. Alabama, 1976), affirmed 571 F.2d 238 (5th Cir. 1978), reversed, 446 U.S. 55 (1980).

[174] This determination was made by reference to: United States Bureau of the Census, 1980 Census of Population and Housing. Advance Reports, Publication Nos. 80-V-1-50 (current as of April, 1980); Joint Center for Political Studies, "National Roster of Black Elected Officials," Vol. 4 (1972)—Vol. 10 (1980); United States Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (Sept. 1981), and telephonic inquiries to appropriate state officials.

sas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kansas, Kentucky, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia.

In addition, there appear to be additional "objective factors of discrimination" present in virtually every one of these states. For example, according to the United States Commission on Civil Rights, every state listed has some definite history of discrimination.[175] This often has been exemplified in the existence of segregated or "dual" school systems.[176] In addition, the Council of State Governments has reported that Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee and Virginia provide for the cancellation of registration for failure to vote, a typical "objective factor of discrimination."[177]

The Council has also reported that Alabama, Alaska, Arizona, California, Colorado, Illinois, Indiana, Mississippi, New Jersey, New York. North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas, and Utah establish a minimum residence requirement before elections, another typical "objective factor of discrimination."[178] Further, according to the Council such states as Alaska, Arkansas, California, Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Missouri, New Mexico, Oklahoma, Pennsylvania, Tennessee, Texas, and Utah have established staggered electoral terms for members of the State Senate, still another "objective factor of discrimination."[179]

From the foregoing, the subcommittee concludes that there is a distinct possibility of court-ordered restructuring with regard to the system of electing members to at least thirty-two state legislatures if the results test is adopted for section 2.[180] (See chart A.)

The subcommittee emphasizes that the three or four "objective factors of discrimination" discussed above are by no means exhaustive of the possibilities. Additional factors which might serve as a basis for court-ordered changes of systems for electing members of state

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[175] United States Commission on Civil Rights, The Unfinished Business, Twenty Years Later . . . A Report to the U.S. Commission on Civil Rights by its Fifty-one State Advisory Committees (Sept. 1977). See supra note 131.

[176] Id. See also, The National Institute of Education, School Desegregation: A Report of State and Federal Judicial and Administrative Activity and Supplement (Dec. 1978); U.S. Commission on Civil Rights, Desegregation of the Nation's Public Schools: A Status Report (1979); U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (1967). See supra note 133.

[177] The Council of State Governments, The Book of the States (1980–81). The number of days required varies from state to state. States which simply require that a voter be a "resident" were not included in this list. See supra note 135.

[177] Id. States have been included above which have any such provision. Some states provide for cancellation for failure to vote in the last general election, while others provide for cancellation for failure to vote within a specified number of years or in a specified number of elections. See supra note 134.

[178] Council of State Governments, Reapportionment Information Service, State Profiles (Mar. 1981). See supra note 139.

[180] Some witnesses have suggested that the subcommittee exaggerates the impact of the amendments to section 2 because "There are very few of us who have the resources and those of us who can only do so many cases. I do not think that people ought to be that fearful that every jurisdiction is going to be challenged about everything overnight." Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund. Even if this is true, it is less than comforting to some that, in place of a rule of law precluding legal action against countless municipalities throughout the Nation, the results test would substitute a rule in which actions were limited on the basis of the legal resources of various "public interest" litigating organizations.

legislatures which have not achieved proportional representation include: disparity in literacy rates by race, evidence of racial bloc voting, a history of English-only ballots, disparity in distribution of services by race, numbered electoral posts, prohibitions on single-shot voting, majority vote requirements, significant candidate cost requirements, special requirements for independent or third party candidates, off-year elections, and the like.

CHART A—STATES LACKING PROPORTIONAL REPRESENTATION IN ONE OR BOTH HOUSES OF THE STATE LEGISLATURE AND PRESENCE OF "OBJECTIVE FACTORS OF DISCRIMINATION"

States lacking proportional representation in one or both houses of the State legislature	Some history of discrimination	Cancellation of registration for failure to vote	Minimum residence requirement before election	Staggered terms for members of state senate
Alabama	X		X	
Alaska	X	X	X	X
Arizona	X	X	X	
Arkansas	X	X		X
California	X		X	X
Colorado	X	X	X	X
Connecticut	X			
Delaware	X	X		X
Florida	X	X		X
Georgia	X	X		
Illinois	X	X	X	X
Indiana	X	X	X	X
Kansas	X			
Kentucky	X	X		X
Louisiana	X	X		
Maryland	X	X		
Massachusetts	X			
Mississippi	X		X	
Missouri	X			X
New Jersey	X	X	X	
New Mexico	X	X		X
New York	X	X	X	
North Carolina	X	X	X	
Oklahoma	X	X		X
Pennsylvania	X	X	X	X
Rhode Island	X	X	X	
South Carolina	X	X		
South Dakota	X	X		
Tennessee	X	X	X	X
Texas	X		X	X
Utah	X		X	X
Virginia	X	X		

Note: The presence in a State of a particular "objective factor of discrimination" is indicated by an "X" in the column on the same line as the name of the State. The information presented in the chart is the same as presented above in the text and the sources are the same as noted above. The chart should be viewed as merely another way of depicting this information, and should be considered in light of the text and related notes. In particular it should be kept in mind that only a sampling of the "objective factors of discrimination" are set forth in the chart.

Municipalities

Illustrative of the municipalities in jeopardy of court-ordered change under the new results test are the following:

Anchorage, Alaska

The city of Anchorage has an assembly composed of eleven members, all of whom are elected at-large. There are no minority members in the assembly, but minorities comprise approximately 15 percent of the population of Anchorage. This lack of proportional representation, when combined with the at-large voting practice, as well as evidence of segregation in the local schools (according to the U.S. Commission on Civil Rights) might well result in extensive judicial restructuring of the Anchorage system.

Baltimore, Md.

The City Council of Baltimore is composed of 18 members, three elected from each of six districts. There are six minority members of the 18 members on the Council, or 33.3 percent of the membership. However, minorities comprise 56.2 percent of the Baltimore population. Other factors in Baltimore include a history of discrimination and dual school systems (according to the U.S. Commission on Civil Rights), and the existence of filing fees for some city offices. The combination of factors in Baltimore would likely result in restructuring the Baltimore City electoral process by court order.[181]

Birmingham, Ala.

The Birmingham City Council has nine at-large seats, two of which are occupied by members of a minority group (22.2 percent). Minorities comprise 56 percent of Birmingham's population. This lack of proportionality, when assessed in light of the history of discrimination and segregated schools (according to the U.S. Commission on Civil Rights and the courts), as well as the at-large voting practice leads to the conclusion that the Birmingham City Council would likely be restructured by court-order.

Boston, Mass.

The Boston City Council is composed of nine members elected at-large. One council member is a member of a minority group (11.1 percent). Minorities comprise 30 percent of the population of Boston. This lack of proportional representation, when assessed in light of the at-large voting practice, a history of dual school systems as well as a history of discrimination in Boston (according to the U.S. Commission on Civil Rights) would likely result in judicially ordered reorganization of the system for electing the Boston City Council.

Cincinnati, Ohio

The Cincinnati City Council is composed of nine members elected at-large. One member of the council is a member of a minority group (11.1 percent). The minority population of Cincinnati is at least 33 percent. This lack of proportionality and the at-large electoral practice, when weighed in light of the history of segregated schools in Cincinnati, (according to the U.S. Commission on Civil Rights), will likely result in restructuring of the system for electing members of the City Council.

Dover, Del.

The City Council of Dover is comprised of eight members elected at-large. One is a member of a minority group (12.5 percent). Minorities comprise 31.5 percent of Dover's population. This lack of proportional representation, when combined with the at-large voting

[181] Delegate John Douglass of Baltimore, Chairman of the Maryland Black Caucus' redistricting efforts indicated in a recent newspaper article that there is a legal basis to challenge the state redistricting plan in Maryland because Baltimore which is 55% black will have only four out of nine districts or 44% with majority black populations. Washington Post, January 14, 1982, at B1.

practice, might well result in extensive judicial restructuring of Dover's system.

Fort Lauderdale, Fla.

Fort Lauderdale has a City Council composed of four members, all of whom are elected at-large. There are no minorities on the council, whereas the minority population of Fort Lauderdale is 22.4 percent. This lack of proportionality in the City Council coupled with the at-large system would likely result in court-ordered restructuring of the electoral system of the City Council.

New York, N.Y.

The City Council of New York City has 43 members. Thirty-three members are elected from single-member districts, and two members are elected at-large from each of five boroughs. Of the 43 members of the Council, eight are members of a minority group. All minority members are elected from single-member districts, and all borough at-large representatives are white. Thus, the percentage of minorities on the City Council is 18.6 percent whereas the percentage of minorities in New York City is approximately 40 percent. The lack of proportional representation by race on the New York City Council, when combined with the at-large voting practice, and the history of discrimination in New York City including the history of dual school systems (according to the U.S. Commission on Civil Rights) would render the New York City Council election system subject to court-ordered restructuring.

Norfolk, Va.

The Norfolk City Council is composed of seven members elected at-large. One is a member of a minority group (14 percent), whereas approximately 39 percent of the population is comprised of minorities. This lack of proportional representation by race on the City Council, when viewed in conjunction with the at-large voting practice, leads to the conclusion that the electoral system for the City Council of Norfolk would undergo reconstruction by court-order.

Pittsburgh, Pa.

The Pittsburgh City Council has nine at-large seats, one of which is occupied by a member of a minority group (11.1 percent). Minorities comprise 25.3 percent of the Pittsburgh population. This lack of proportional representation, when combined with the at-large voting practice and history of segregated schools (according to the U.S. Commission on Civil Rights, and the courts), might well result in extensive judicial restructuring of Pittsburgh's system.

San Diego, Calif.

Members of the City Council of San Diego are elected at-large. One of the eight Council members is a member of a minority group (12.5 percent) whereas minorities comprise approximately 24 percent of

the population of San Diego. This lack of proportional representation when combined with the at-large voting practice as well as history of segregated schools (according to the U.S. Commission on Civil Rights) might, well result in extensive judicial restructuring of San Diego's system of electing members of the City Council.

Savannah, Ga.

The City Council of Savannah has eight members, two elected at-large and six by district. Two are members of a minority group, whereas 50 percent of the population of Savannah is comprised of minorities. When combined with the other factors in Savannah such as the history of segregated schools (according to the courts), it becomes apparent the system for electing the City Council of Savannah will likely be changed by court-order if the results test is established in section 2.

Waterbury, Conn.

The City of Waterbury, Connecticut is governed by a Board of Aldermen. The Board consists of 15 members, all of whom are elected on an at-large basis. There is one minority on the Board, whereas there is a minority population of 16.5 percent in Waterbury. This lack of proportional representation by race, when combined with the at-large voting practice and history of segregated schools (according to the courts), would likely result in a court-ordered restructuring of the system for selecting the Board of Aldermen of Waterbury.

These examples are but a few illustrations of literally thousands of electoral systems across the country which may undergo massive judicial restructuring should the proposed results test be adopted.[181.1] The information presented has dealt with state legislatures and municipalities, but other political subdivisions such as school boards and utility districts would be subject to the same judicial scrutiny should the new standard be adopted.

The subcommittee is well aware that proponents of the results test consider this discussion of the impact of section 2 to exaggerate the situation considerably. In response, the subcommittee would make the following general observations: First, the burden of proof in this case rests with those who would seek to alter the law, not those who would defend it. Second, the subcommittee does not believe that proponents of the results test have been convincing in explaining how the test would work in a manner *other* than that described in this section. In short, where in the text of H.R. 3112 or elsewhere is there *anything* which precludes a section 2 violation in the circumstances described in states and municipalities in this section? Indeed, the results test would seem to demand a violation in these circumstances. Finally, the subcommittee is utterly confounded as to what kind of evidence could be submitted to a court by a defendant-jurisdiction in order to overcome the lack of proportional representation. What evidence would rebut evidence of lack of proportional representation (and the existence of an additional "objective" factor of discrimina-

[181.1] In his testimony, Assistant Attorney General Reynolds specifically described difficulties in Pittsburgh, Pennsylvania; Hartford, Connecticut; Wilmington, Delaware; and Kansas City, Kansas. Seenate Hearings, March 1, 1982.

tion)? The subcommittee has yet to hear a convincing response. In *Mobile*, for example, the absence of discriminatory purpose on the part of the city, as well as the existence of legitimate, non-discriminatory reasons behind their challenged electoral structure (at-large system) was considered insufficient to overcome the lack of proportional representation. Repeatedly, the subcommittee has been "reassured" that such concerns are not well founded because a court would consider the "totality of circumstances". As noted in section VI(a), this begs the basic question: What is the standard for evaluating *any* evidence, including the "totality of circumstances", under the results test? What is the ultimate standard by which the court assesses whatever evidence is before it? Apart from the standard of proportional representation, this subcommittee sees no such standard.

VII. Section 5 of the Act

On April 22, 1980, the Supreme Court revisited the issue of the constitutionality of the Voting Rights Act and reached the same conclusion that it had some fourteen years earlier in *South Carolina* v. *Katzenbach*.[182] In *City of Rome* v. *United States*,[183] the Court addressed the question, as it had been posited by the City of Rome, Georgia, in an attempt to seek release from the section 5 preclearance requirements of the Act.

In finding that the Act was indeed a constitutional and an appropriate congressional activity pursuant to the dictates of section 2 of the Fifteenth Amendment, the Court, through Justice Marshall, specifically examined the applicability of section 5 *since* the 1975 amendments to the Act. Citing extensively from House and Senate reports, it was noted that although gains had been made by blacks in the covered jurisdictions:

> Congress found that a seven-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination.[184]

Accordingly, the Court concluded that, predicated upon congressional findings of fact, its legislative actions had a sound constitutional basis. The Court stated:

> When viewed in this light, Congress' considered determination that at least another seven years of statutory remedies were necessary to counter the perpetuation of 95 years of voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.[185]

It is well-settled, then, that Congress can, through its powers derived from section 2 of the Fifteenth Amendment, enact legislation to remedy identifiable voting discrimination when founded upon sufficient factual findings.

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[182] 383 U.S. 301 (1966).
[183] 446 U.S. 156 (1980).
[184] 446 U.S. at 182.
[185] Id.

A. OPERATION OF PRECLEARANCE

In addition to an examination of the constitutionality of preclearance, the subcommittee believes that a review of the operation of preclearance as it presently applies is necessary in order to assess the Act.

A jurisdiction seeking to preclear a voting change under section 5 has the burden of showing the United States District Court for the District of Columbia or the Attorney General that the voting change submitted for review "does not have the purpose and will not have the effect" of denying or abridging "the voting rights of a covered minority." Since few of the covered jurisdictions have used judicial preclearance, most experience has involved the Department of Justice, which, for example, received 7,300 submission in 1980.[186]

Although the Department of Justice has issued no guidelines or regulations regarding the "effects" test of section 5,[187] an apparent pattern of the application of the standard has emerged from the experience of jurisdictions covered by the preclearance mechanism of the Act. No longer is the objective equal access in registration and voting, but rather a structuring of election systems that translates into methods of maximizing the representation of minorities by members of their own group. The policy of the Department ostensibly is founded upon the language in section 5, which applies to "any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting" that is different from that in effect on the date used to determine coverage pursuant to section 4(b).[188]

In evaluating certain submissions, such as reapportionment or redistricting plans, as well as annexations, the Department "applies the legal standards that have been developed by the courts."[189] Yet, there have been few suits for judicial preclearance—a total of 25 since 1975.[190] The pertinent cases have created a system of law which has not always provided clear guidance.[191]

B. CONTINUED COVERAGE AND BAIL-OUT

The subcommittee also concerned itself, with an inquiry aimed at a determination of the continuing nature of the "exceptional conditions" within the covered jurisdictions.[192] The subcommittee finds that such a determination is necessary in order to insure that any further continuation of coverage comports with constitutional principles. However, nearly every witness acknowledged some need for the con-

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[186] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds Attachment at 10.

[187] Letter of Assistant Attorney General of the United States William Bradford Reynolds to U.S. Senator Orrin G. Hatch, January 8, 1982. (Hereinafter referred to as Reynolds' January letter.)

[188] Those dates are November 1, 1964; November 1, 1968; and November 1, 1972, or else the Presidential election dates in those years.

[189] Letter of Assistant Attorney General William Bradford Reynolds to U.S. Senator Orrin G. Hatch, February 25, 1982. (Hereinafter referred to as Reynolds February letter.) See also Reynolds' January letter supra note 187.

[190] See supra note 186 at 145–6.

[191] See generally supra Section IV

[192] *South Carolina* v. *Katzenbach*, 383 U.S. 301, at 334. Regarding preclearance, the Court noted, "This may have been an uncommon exercise of Congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

tinuance of section 5 coverage.[193] Still, there was an acknowledgment by many witnesses that progress has been made and that the conditions existent in 1982 are not those of 1965, 1970, or 1975.[194]

Accordingly, the subcommittee recognizes that although the need for coverage may continue, it notes that great strides have been made by minorities in the electoral process in the covered jurisdictions. Moreover, it appears that the historic abuses of 1965 are clearly not as widespread as they were found to be by previous Congresses. An examination of minority registration figures illustrates an example of increased participation.[195]

C. BAIL-OUT CRITERIA IN HOUSE LEGISLATION

Of the various proposals dealing with a release mechanism from the act, all generally tend to establish criteria which must be met before a covered jurisdiction can escape or bailout from section 5 coverage. During the course of the hearings, many witnesses cited the need for a bailout, noting that such a goal is not only desirable but appropriate.[196]

Historically, the test for bail-out has always been that for a specified number of years, the petitioning jurisdiction had not used a test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." Although the original period of coverage was for five years past 1965, voting rights legislation in 1970 and 1975 aggregated this period to seventeen years. Accordingly, absent congressional action, those jurisdictions originally covered in 1965 would have an opportunity after August 6, 1982, to petition the U.S. District Court for the District of Columbia for release from section 5 coverage. Successful petitions, however, would remain within the jurisdiction of the District Court for a period of five additional years.[197]

The subcommittee chose to begin its analysis of bail-out criteria with the provisions of H.R. 3112. This bill extends the present Act until

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[193] See e.g., Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith; Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People; January 28, 1982, Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union; U.S. Representative Henry R. Hyde; February 1, 1982, U.S. Representative M. Caldwell Butler; February 2, 1982, Abigail Turner, Attorney, Mobile, Alabama; February 4, 1982, William P. Clements, Governor of Texas; February 11, 1982, Dr. Arthur Flemming, Chairman, United States Commission on Civil Rights; February 12, 1982, Drew Days, Professor, Yale School of Law.

[194] See e.g., Senate Hearings, January 27, 1982. Attorney General of the United States William French Smith; Ruth J. Hinerfeld, President, League of Women Voters of the United States; January 28, 1982, U.S. Representative Henry R. Hyde; U.S. Representative Thomas J. Bliley; February 4, 1982. E. Freeman Leverett, Attorney, Elberton, Georgia; February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia.

[195] The Voting Rights Act: Unfulfilled Goals, United States Commission on Civil Rights, at 40–41 (1981). See also chart B infra.

[196] See e.g., Senate Hearings, January 27, 1982. Attorney General of the United States William French Smith; January 28, 1982, U.S. Representative Henry Hyde; February 1, 1982, Susan McManus, Professor, University of Houston; February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia; March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[197] Section 4(a) [42 U.S.C. Sec. 1973b(a)]. Technically speaking, there is currently a bail-out provision of sorts in the present Act apart from the requirement that a "test or device" be avoided for a period of years. This provision in section 4(a) permits bail-out if the jurisdiction can demonstrate that the "test or device" was never utilized for a discriminatory purpose. In the 17 years of the Act, nine political subdivisions (primarily outside the South) have been released from coverage under this provision, in each case the Attorney General consenting to judgement. No bail-out petition has ever prevailed as a result of full-fledged litigation. Political subdivisions which could not demonstrate that a "test or device" was never utilized for a discriminatory manner prior to 1965 have not been able to bail-out since then. Cf. *Commonwealth of Virginia* v. *United States* 386 F. Supp. 1319 (1974), affirmed 420 U.S. 901 (1975) (State of Virginia could not bail-out despite showing that "test or device" never used for discriminatory purpose because history of dual school system must have affected voting practices of black citizens.)

1984, and thereafter utilizes a ten-year period for assessing the proposed new bail-out criteria:

> A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action [the following elements have been satisfied]:

Thereafter, the bill sets out a series of elements, each of which is necessary in order to accomplish a successful release.

> *Element 1.*—No such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2).

The use of "no test or device" has been the sole element for the duration of the Act, and as was noted by Assistant Attorney General Reynolds a ". . . large number of jurisdictions would be able to meet that test at this stage." [198]

> *Element 2.*—No final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote.

This section basically establishes three types of bars to bail-out: judicial findings of discrimination concerning the right to vote; consent decrees entered into by which voting practices have been abandoned; and pending actions alleging denials of the right to vote.

A violation of the "final judgment" aspect would obviously constitute strong evidence that the jurisdiction has not abided by the principles upon which the act is founded and has not acted in good faith. According to Assistant Attorney General Reynolds, some 17 jurisdictions would be precluded from bail-out solely as a result of this factor, although he does not view it as being "an onerous requirement." [199]

With regard to the "consent decree" ban, the subcommittee believes that to preclude bail-out for a jurisdiction, solely because it has entered into a consent decree, settlement, or agreement resulting in any

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[198] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[199] Id.

abandonment of a challenged voting practice *without more* is inconsistent with established practices and prudent legal principles. It is sound public policy that litigation should be avoided where possible; yet, the inclusion of consent decrees as a bar to bail-out can only engender prolonged litigation that will only detract from the long-term goals of the act. As Assistant Attorney General Reynolds stated,

> . . . clearly the preference is to settle cases and to try to obtain consent decrees and that is a way to resolve these litigations if we can. [Element 2] seems to me to sound like it might be a disincentive to jurisdictions to enter that kind of arrangement. [200]

The bar relating to pendency of actions alleging denials of the right to vote is also of concern to the subcommittee. Clearly, litigious parties could preclude a jurisdiction from a bail-out without any local control whatsoever. Moreover, this provision ignores the existing "probationary" period after bail-out.

> *Element 3.*—No Federal examiners under this Act have been assigned to such State or political subdivision.

This element would preclude bail-out if, during the previous ten-year period, either the Attorney General or a Court, had ordered the appointment of Federal examiners. Inasmuch as the use of Federal examiners entails, "displacing the discretionary functions of local voter registration officials," [201] it is by its very nature an extraordinary use of power beyond local control. There is no appeal nor review of the decision of the Attorney General. Moreover, the subcommittee must agree with Assistant Attorney General Reynolds in his assessment that it is unclear what this requirement is designed to address.[202]

The subcommittee acknowledges that in the years immediately after the 1965 Act, the use of examiners for registration purposes was successful. However, since 1975, examiners certified by the Attorney General have been utilized to list voters in only two counties.[203]

It should be noted that since August 1975, the Attorney General, however, has certified 32 counties as "examiner counties," [204] but this has been necessary in order simply to provide Federal observers, for observers may be directed only to counties in which there are examiners serving.[205]

The subcommittee believes that this element is totally beyond the control of the covered jurisdictions and could serve to frustrate any incentive to bail-out. This is especially true when, as noted, the assignment of examiners could be made only to further another administrative goal—the appointment of observers to monitor elections—which does not even imply voting irregularities.

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[200] Id.
[201] Id.
[202] Id. Reynolds observed: "Federal examiners are assigned to jurisdictions, in connection with the registration process and listing eligible voters. If that is all it pertains to. I think there are a limited number of counties that would be affected. But, on the other hand, also Federal examiners are assigned to different countries in conjunction with sending in several of the Federal observers on request to observe different elections. If the assignment of Federal examiners for that purpose were to be included as an element which would prevent bail out, there would be a large number of counties under that particular requirement and it is not clear from the language or the House report exactly what is intended there."
[203] Id.
[204] Id.
[205] Id.

Element 4.—Such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment.

This requirement would bar bail-out if any voting law, practices, or procedure were implemented in the ten-year period without preclearance. Needless to say, the subcommittee recognizes the necessity of covered jurisdictions' complying with preclearance. Yet, it is conceivable that, inasmuch as the bail-out of the greater jurisdiction is tied to the lesser, some minor change could well have been instituted without preclearance. Moving the office of the county registrar from one floor to another might be an example. Nevertheless, such an omission would preclude the county as well as the state from bail-out. As an attorney with the Voting Section of the Justice Department has noted:

> Complete compliance with the preclearance requirement is practically impossible in two respects.
>
> First, no matter how many changes an official submits to the Attorney General, a student of section 5 can always find another change that has not been submitted. For example, a probate judge always submits changes in the location of polling places, but he neglects to submit the rearrangement of tables and booths at one polling place.
>
> Second, no matter how well an election administrator plans in advance of an election, there will always be changes that must be implemened before they can be precleared. For example, a polling place burns down the night before the election.[206]

The subcommittee feels that such an action should not absolutely preclude bail-out and, this requirement should not be so stringent as to foreclose bail-out for inadvertence.

Element 5. The Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending.

This element would bar bail-out if there has been any objection to a submission for preclearance. In the practice of section 5 preclearance, it is common for the Attorney General to interpose an objection to a voting change simply because there is not enough information on hand for the affirmative decision to be made that the proposal "does not have the purpose and will not have the effect" of

[206] David H. Hunter, "Section 5 of the Voting Rights Act of 1965: Problems and Possibilities," prepared remarks for delivery at the Annual Meeting of the American Political Science Association (1980).

discrimination in voting. Accordingly, an objection by the Attorney General does not per se indicate bad faith on the part of the submitting jurisdiction. Moreover, it is not uncommon for an objection to be withdrawn.[207] Assistant Attorney General Reynolds noted that of the 695 objections that had been interposed:

> Some are far more important but this [section] does not differentiate.[208]

The subcommittee acknowledges that the "no objection" specification is founded upon a general basis of assuring compliance but notes that the inability to examine the history of a covered jurisdiction's submissions might preclude bail-out due to a trivial proposed change or one that was abandoned.

> *Element 6.*—Such State or political subdivision and all governmental units within its territory—
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> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
>
> (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and
>
> (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

The criteria of this section would require a jurisdiction seeking bail-out to prove that it and all of its political subdivisions have eliminated methods which "dilute equal access" to the electoral process, have engaged in "constructive efforts" to end intimidation and harassment of persons "exercising rights protected" under the Act, and have engaged in "other constructive efforts" in registration and voting for "every" voting age person and in appointing minorities to election posts. It is totally unclear what a "constructive effort" would be in any of these regards although it is difficult for this subcommittee to believe that this term is intended to be employed as anything other than a vehicle to promote "affirmative action" principles of civil rights to the voting process.

As Assistant Attorney General Reynolds noted, this element, "would introduce a whole new feature that had not been in the Act at the time these jurisdictions were covered and require an additional element of proof other than simply requiring a 10-year period of compliance with the Act." [209] This section, indeed, raises new questions regarding bail-out criteria not only as to the substantive requirements but also as to proof.

The Assistant Attorney General indicated his concern when he suggested that "what one means by inhibit or dilute . . . would be subject to a great deal of litigation." [210] He further expressed his apprehension as to the constructive efforts requirements:

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[207] See, e.g., Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.
[208] See supra note 198.
[209] Id.
[210] Id.

> This is a requirement which does go well beyond existing law. It is also well to remember in terms of the bail-out that the House bill calls for counties to show not only that *they* can meet these requirements but also *all* political sub-units within the counties and therefore you are talking, for bail-out purposes, about mammoth litigation that will demonstrate that "constructive efforts" have been made by all of these political subdivisions within the county as well as the county and that they have done whatever is necessary to insure there is no inhibition or dilution of minority vote.[211]

The subcommittee believes that the introduction of these new elements will not aid in overcoming past discrimination even if they can be interpreted. The subcommittee does believe that they will generate considerable litigation of an uncertain outcome. A reasonable bail-out is the goal of the subcommittee, and when this element is weighed with that goal, the subcommittee must resolve that such reasonableness is lost. It agrees with Assistant Attorney General Reynolds' comment on the obvious results of such an enactment:

> It goes beyond determining a violation of the Act or the Constitution and would require in each bail-out suit full-blown litigation as to whether or not the conduct of the methods of election had either a purpose or effect of . . . discouraging minority participation. That is a very complex kind of litigation to go through in a bail-out.[212]

The process of bail-out may become largely irrelevant if the proposed change in section 2 is adopted. Jurisdictions that may be successful in seeking bail-out would be subject to suits under section 2 by local plaintiffs dissatisfied with bail-out and would be required to relitigate the issue under the similar standard incorporated in the House version of section 2.

VIII. Constitutionality of House Legislation

Completely apart from the public policy merits of the House-proposed amendments to the Voting Rights Act, the subcommittee believes that there are serious constitutional concerns about those changes. It is conceivable that the House-amendments could render substantial parts of the Voting Rights Act constitutionally invalid.

A. SECTION 5

The first concern relates to the "in perpetuity" extension of the preclearance obligations in section 5 of the Voting Rights Act. Unlike earlier "extensions" of the preclearance obligation which have been for limited periods, the House legislation would make this obligation permanent. Rather than only having to maintain "clean-hands" for a five-year period or a seven-year period (i.e. avoided the use of a prohibited "test or device" for that time), H.R. 3112 would impose a permanent obligation upon a covered state to secure the permission

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[211] Id.
[212] Id

of the Justice Department for proposed changes in election laws and procedures.

The constitutional foundation of the Voting Rights Act rested in large part upon its temporary and remedial nature. While recognizing that the Act was an "uncommon exercise of congressional power", the Supreme Court in *South Carolina* v. *Katzenbach* nevertheless concluded that:

> exceptional circumstances can justify legislative measures not otherwise appropriate.[213]

While recognizing the intrusions upon traditional concepts of federalism by the Voting Rights Act, the Court upheld the pre-clearance procedure as a purely remedial measure premised upon the enforcement authority of Congress under section 2 of the Fifteenth Amendment.[214]

It is difficult for this subcommittee to understand how such circumscribed authority in Congress can justify a permanent extension of this "uncommon exercise" of legislative power. If the justification for the Voting Rights Act is the existence of "exceptional" circumstances in the covered jurisdictions (primarily in the South) as stated by the Court in *Katzenbach*, and reiterated more recently in *City of Rome* v. *United States*,[215] by what authority is Congress able to enact legislation requiring permanent pre-clearance? "Exceptional" circumstances, by very definition, cannot exist in perpetuity. The proposed House bill attempts to institutionalize an extraordinary relationship between the states and Congress—one upheld by the Court only to the extent that Congress concluded that that "exceptional" circumstances obtained in certain parts of the country. As Attorney General William French Smith remarked:

> The Supreme Court in sustaining the Act took special care to note the temporary nature of the special provisions.[216]

In the view of the subcommittee, reasonable individuals can differ with respect to whether or not "exceptional" conditions continue to exist within covered jurisdictions with regard to the status of voting rights and, hence, whether or not a further temporary extension of the preclearance obligation can be justified. It is extremely difficult, however, for the subcommittee to conclude that such conditions require a permanent re-ordering of the federal structure of our government.

Ms. Hinerfeld, representing the League of Women Voters, for example, testified that:

> The extraordinary conditions that existed at the time of *Katzenbach*, of course, are not the conditions that exist today and I think that we are all grateful for that fact.[217]

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[213] 383 U.S. 301, 334 (1966).
[214] Id.
[215] 446 U.S. 156 (1980).
[216] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.
[217] Senate Hearings, January 27, 1982, Ruth Hinerfeld, President, League of Women Voters.

While such figures are not conclusive, it is interesting to note that registration rates for minority voters in such covered states as Alabama, Louisiana, Mississippi, and South Carolina exceed the average national minority registration rate.

CHART B—REPORTED REGISTRATION FOR STATES, BY RACE

[In percent]

State	White registration	Black registration
Alabama	73.3	62.2
Alaska	69.7	----
Arizona	59.4	----
Arkansas	67.4	62.6
California	62.1	61.5
Colorado	69.9	----
Connecticut	73.2	65.4
Delaware	67.8	----
District of Columbia	67.0	52.4
Florida	64.1	58.2
Georgia	67.0	59.3
Hawaii	65.5	----
Idaho	73.6	----
Illinois	74.0	72.1
Indiana	69.7	64.2
Iowa	76.4	----
Kansas	71.0	40.3
Kentucky	67.7	49.9
Louisiana	74.5	69.0
Maine	81.4	----
Maryland	68.3	61.3
Massachusetts	73.4	43.6
Michigan	73.9	68.4
Minnesota	83.8	----
Mississippi	85.2	72.2
Missouri	75.5	77.0
Montana	74.7	----
Nebraska	72.4	----
Nevada	55.2	----
New Hampshire	74.1	----
New Jersey	69.8	48.9
New Mexico	68.3	----
New York	62.4	46.5
North Carolina	63.7	49.2
North Dakota	92.1	----
Ohio	66.5	68.3
Oklahoma	67.7	51.9
Oregon	73.7	----
Pennsylvania	61.9	66.6
Rhode Island	74.2	----
South Carolina	57.2	61.4
South Dakota	81.9	----
Tennessee	66.9	69.4
Texas	61.4	56.4
Utah	77.4	----
Vermont	73.6	----
Virginia	65.4	49.7
Washington	67.8	70.0
West Virginia	69.5	----
Wisconsin	87.8	70.4
Wyoming	64.1	----

Note: Numbers represent census estimates.

Source: Bureau of the Census, Department of Commerce, November 1980.

Minority registration, since the passage of the Voting Rights Act has risen substantially in every covered state. (chart C) In Mississippi, for example, it has risen from 6.7 percent in 1964 to 72.2 percent in 1980, significantly surpassing minority registration rates in such non-covered jurisdictions as New York (46.5 percent), New Jersey (48.9 percent), and Kansas (40.3 percent).

CHART C—VOTER REGISTRATION IN 11 SOUTHERN STATES, BY RACE: 1960 TO 1976

[In thousands, except percent]

Year and race	Total	Ala.	Ark.	Fla.	Ga.	La.	Miss.	N.C.	S.C.	Tenn.	Tex.	Va.
1960:												
White	12,276	860	518	1,819	1,020	993	478	1,861	481	1,300	2,079	867
Black	1,463	66	73	183	180	159	22	210	58	185	227	100
Percent white	61.1	63.6	60.9	69.3	56.8	76.9	63.9	92.1	57.1	73.0	42.5	46.1
Percent black	29.1	43.7	38.0	39.4	29.3	31.1	5.2	39.1	13.7	59.1	35.5	23.1
1976:												
White	21,690	1,544	817	3,480	1,703	1,445	866	2,137	828	1,886	5,191	1,796
Black	4,149	321	204	410	598	421	286	396	285	271	640	317
Percent white	67.9	79.3	62.6	61.3	65.9	78.4	80.0	69.2	58.4	73.7	69.1	61.7
Percent black	63.1	58.4	94.0	61.1	74.8	63.0	60.7	54.8	56.5	66.4	65.0	54.4

Source: Voter Education Project, Inc., Atlanta, Ga., "Voter Registration in the South," issued irregularly.

Again, it is important to emphasize that such data is not presented to suggest that no extension of the preclearance obligation is warranted. Few would argue that all traces of the discriminatory history that existed in some of these covered jurisdictions has been eradicated by the passage of years since the original Voting Rights Act. What they do suggest, however—quite clearly to the Subcommittee—is that substantial progress has been made in these jurisdictions in the past 17 years with regard to voting rights. However many more years of pre-clearance are necessary, there should properly come a time when this "exceptional" remedy will no longer be necessary.

Mr. Leverett testified that the extension of section 5 in perpetuity would raise serious constitutional questions:

> Making it permanent, as H.R. 3112 purports to do, subject only to a bailout procedure that is so stringent that I think hardly any political subdivision could ever satisfy it, does raise serious questions because the Act was justified on the basis of the emergency that existed and the fact that there was such a great disparity in the number of minorities that were registered. Well, the predicate of that no longer exists. Minority registration has become quite substantial since that time.[218]

The subcommittee agrees that indeed serious constitutional questions are presented by the proposal to extend section 5 in perpetuity.

To proponents of H.R. 3112 who would argue that new bail-out provisions mitigate the permanent nature of the new preclearance obligation, the subcommittee responds that this would be the case only if the bail-out were reasonably designed to afford an opportunity for release from preclearance by those jurisdictions within which "exceptional" circumstances no longer existed. The subcommittee believes strongly that such is not the case. As discussed in more detail above,[219] it is our view that the bail-out in H.R. 3112 is wholly unreasonable and affords merely an illusory opportunity to be released from coverage.

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[218] Senate Hearings, February 4, 1982, E. Freeman Leverett, Attorney, Elberton, Georgia.

[219] See generally supra Section VII.

In this respect, the subcommittee notes the observation of Assistant Attorney General Reynolds in response to a question about the likelihood of jurisdictions bailing-out under the House measure:

> Our assessment is that there are very few, if any, jurisdictions that would be able to bail-out of coverage for a considerable period of time.[220]

No evidence of any kind has been shared with the subcommittee that would contradict this assessment of the "reasonableness" of the House bail-out. This is a critical matter since the very constitutionality of the proposed amendments—and indeed of the preclearance provision itself—rests upon such an affirmative finding.

B. SECTION 2

The other major constitutional problem arising from the House measure relates to the proposed change in section 2 which substitutes a results test for the present intent standard for identifying voting discrimination.

The subcommittee notes as a preliminary consideration that this would overturn the ruling of the Supreme Court in the *City of Mobile* v. *Bolden* decision [221] interpreting both section 2 and the Fifteenth Amendment (upon which section 2 is predicated) to require a finding of purposeful or intentional discrimination. It is a serious matter for Congress to attempt to over-rule the Supreme Court, particularly when that action relates to a constitutional interpretation by the Court. As former Attorney General Bell has observed, for example:

> My view, based on long experience in government and out is that the Supreme Court should not be overruled by Congress except for the most compelling and extraordinary circumstances . . . To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government.[222]

Completely apart from the public policy implications of overturning a Supreme Court decision, there are important questions relating to whether or not Congress has the Constitutional *authority* to undertake such an action. Although section 2 of the Voting Rights Act has always been considered a restatement of the Fifteenth Amendment to the Constitution, it is, of course, true that Congress may choose to amend section 2 to achieve some other purpose. In other words, the subcommittee recognizes that section 2 need not be maintained indefinitely as the statutory embodiment of the Fifteenth Amendment.

To the extent, however, that the Supreme Court has construed the Fifteenth Amendment to require some demonstration of purposeful discrimination in order to establish a constitutional violation, and to the extent that section 2 is enacted by Congress under the

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[220] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[221] 446 U.S. 55 (1980). "No reader of the House report can fail to grasp that Section 2 was written to make winners out of the losers in *Mobile*," Eastland, "Affirmative Voting Rights," The American Spectator, April 1982, p. 25.

[222] Statement submitted to the Senate Subcommittee on the Constitution by Griffin Bell, former Attorney General of the United States, March 4, 1982.

constitutional authority of the Fifteenth Amendment, the subcommittee does not believe that Congress is empowered to legislate outside the parameters set by the Court, indeed by the Constitution.

Section 2 of the Fifteenth Amendment provides:

> Congress shall enforce the provisions of this Article by appropriate legislation.

Congress, however, is not empowered here or anywhere else in the Constitution to "define" or to "interpret" the provisions of the Fifteenth Amendment, but simply to "enforce" those substantive constitutional guarantees already in existence. To allow Congress to interpret the substantive limits of the Fifteenth Amendment in a more expansive manner (or indeed in a disparate manner) than the Court is to sharply alter the apportionment of powers under our constitutional system of separated powers.

It is also to enlarge substantially the authority of the Federal Government at the expense of the state governments since it must be recognized that the Fifteenth Amendment fundamentally involves a restraint upon the authority of state governments and a conferral of authority upon the Federal Government. To permit Congress itself to define the nature of this authority, in contravention of the Supreme Court, is to involve Congress in a judicial function totally outside its proper purview.[223]

The enactment of a results test in section 2 would be equally improper to the extent that its proponents purported to employ the Fourteenth Amendment as its constitutional predicate. As with the Fifteenth Amendment, the Supreme Court has repeatedly made clear that it is necessary to prove some discriminatory motive or purpose in order to establish a constitutional violation under the Equal Protection Clause.[224]

While proponents of the new results test argue that selected Supreme Court decisions exist to justify the expansive exercise of Congressional authority proposed here [225] this subcommittee rejects these arguments. No Court decision approaches the proposition being advocated here that Congress may strike down on a nationwide basis an entire class of laws that are not unconstitutional and that involve so fundamentally the rights of republican self-government guaranteed to each state under Article IV, section 4 of the Constitution.

It must be emphasized again that what Congress is purporting to do in section 2 is vastly different than what it did in the original Voting Rights Act in 1965. In *South Carolina* v. *Katzenbach*, the Court recognized extraordinary *remedial* powers in Congress under section 2 of the Fifteenth Amendment.[226] *Katzenbach* did not authorize Congress to revise the nation's election laws as it saw fit. Rather, the Court there made clear that the remedial power being employed by Congress in

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[223] If the "on account of" race or color language in the Fifteenth Amendment is broad enough to permit the development of the statutory results test under its authority, this subcommitee wonders about the implications for the proposed Equal Rights Amendment to the Constitution ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.") Compare also the Nineteenth and Twenty-Sixth amendments.

[224] See, e.g., *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 252 (1977); *Massachusetts* v. *Feeney*, 442 U.S. 256 (1979); *Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[225] See, e.g., *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

[226] 383 U.S. at 334.

the original Act was founded upon the actual existence of a substantive constitutional violation requiring some remedy. In *Katzenbach*, following a detailed description of a history of constitutional violations in the covered jurisdictions, Chief Justice Warren concluded that:

> *Under these circumstances*, the Fifteenth Amendment has clearly been violated.[227] (emphasis added)

While *Katzenbach* and later *City of Rome* held that the extraordinary powers employed by Congress in section 5 were of a clearly remedial character, and therefore justified the extraordinary procedures established in section 5, there is absolutely no record to suggest that the proposed change in section 2 involves a similar remedial exercise. Because section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the "exceptional" circumstances found by the *Katzenbach* court to exist in the covered jurisdictions in fact permeated the entire Nation (although again by its very definition the concept of "exceptionality" would seem to preclude such a finding).

There has been no such evidence offered during either the House or Senate hearings. Indeed, the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during hearings in each chamber. Indeed as the strongest advocates of the House measure themselves argued, a proposed floor amendment to extend preclearance nationally was "ill-advised" because no factual record existed to justify this stringent constitutional requirement.[228]

During one exchange, Dr. Flemming, the Director of the U.S. Civil Rights Commission acknowledged that the 420-page, 1981 Report of the Commission on voting rights violations[229] contained no information whatsoever about conditions outside the covered jurisdictions.[230] In the total absence of such evidence, it is impossible for Congress to seriously contend that the permanent, nationwide change proposed in the standard for identifying civil rights violations is a "remedial" effort. As a result, there can be little doubt that such a change is outside the legislative authority of Congress. In short, it is the view of this subcommittee that the proposed change in section 2 is clearly unconstitutional, as well as imprudent public policy.[231]

Moreover, a retroactive results test of the sort contemplated in the House amendments to section 2 (the test would apply to existing electoral structures as well as changes in those structures) has never been approved by the Court even with regard to jurisdictions with a

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[227] Id.

[228] See, e.g., remarks of U.S. Representative James Sensenbrenner, at H6976; U.S. Representative Peter Rodino, at H6976; U.S. Representative Mickey Leland, at H6978; October 5, 1981, Congressional Record.

[229] The Voting Rights Act: Unfulfilled Goals, United States Commission on Civil Rights (1981)

[230] Senate Hearings, February 25, 1982, Dr. Arthur Fleming, Chairman, United States Civil Rights Commission.

[231] The Subcommittee would also observe that many of the same constitutional issues raised in the context of Section 2 have also been raised in the context of legislation to overturn the Supreme Court's abortion decision in *Roe* v. *Wade*. In both instances, Congress is purporting to reinterpret a constitutional provision in contravention of the Supreme Court through a simple statute. See, e.g., testimony by Robert Bork, Hearings Before the Separation of Powers Subcommittee on S. 158, June 1, 1981; Additional views of U.S. Senator Orrin G. Hatch, Committee Print of the Subcommittee on the Separation of Powers on S. 158, 97th Congress, 1st Session.

pervasive history of constitutional violations. In *South Carolina* v. *Katzenbach*, the prospective nature of the section 5 process (applicable only to *changes* in voting laws and procedures) was essential to the Court's determination of constitutionality.[232] This was closely related to findings by Congress that governments in certain areas of the country were erecting *new* barriers to minority participation in the electoral process even faster than they could be dismantled by the courts. Thus, even with regard to covered jurisdictions, the Court has never upheld a legislative enactment that would apply the extraordinary test of section 5 to existing state and local laws and procedures.

One other general observation must not be overlooked. In its efforts to enact changes in the Voting Rights Act that would lead to an effective reversal of *Mobile*, the House invites the Federal judiciary to strike down an unidentified (and unidentifiable) number of election laws, some of recent vintage and some reaching back over centuries. The connection which any of these laws may have with actual violations of the Fifteenth Amendment, past, present, or future, is left entirely to speculation. Without a far more clearly demonstrated connection, it can only be concluded that the proposed amendment exceeds the power of Congress under section 2 of the Fifteenth Amendment, whatever one's constitutional theories are about the enforcement role of Congress under the Reconstruction Amendments and however innovative and creative one is in justifying exercises of Congressional legislative authority.

Finally, there is a strong feeling among some of the members of the subcommittee that the proposed change in section 2 is unconstitutional for one further reason. In short, the results test by focusing legislative and judicial scrutiny so intensely upon considerations of race and color, completely apart from acts of purposeful discrimination, is offensive to the basic color-blind objectives of the Constitution generally and of the Fourteenth and Fifteenth Amendments specifically. As Professor Van Alstyne has observed:

> The amendment must invariably operate . . . to create racially defined wards throughout much of the nation and to compel the worst tendencies toward race-based allegiances and divisions.[233]

The kinds of racial calculations required, for example, by the Justice Department in the events leading up to the case of *United Jewish Organizations* v. *Carey* [234] is but an illustration of the depth of the racial consciousness injected into legislative decision-making by a results or effects test for discrimination.[235] Under the proposed change in section 2, this kind of racially-preoccupied decisionmaking process would become the norm. Rather than pointing our nation in the direction of a

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[232] 383 U.S. at 334.
[233] See supra note 159.
[234] 430 U.S. 144 (1976).
[235] Illustrative of this heightened racial consciousness is the rather remarkable observation of former Assistant Attorney General Days that minority identifiable neighborhoods alone would be immune to gerrymandering even if such gerrymandering were indisputably and incontrovertibly related to partisan or ideological factors. Apparently with respect to such neighborhoods, the results test in section 2 would impose a constitutional obligation upon state legislatures to maximize the impact and influence of such neighborhoods, a remarkably privileged status accorded no other geographical neighborhood. See Senate Hearings, February 12, 1982. Drew Days, Professor, Yale School of Law. See also remarks of Julius Chambers, President, NAACP Legal Defense Fund, Inc. on the same day, in which a similar conclusion was reached. Cf. *Mobile* v. *Bolden*, 440 U.S. 55, 83 (concurring opinion by Justice Stevens).

"color-blind" society in which racial considerations become irrelevant—as was the purpose of the original Voting Rights Act—the proposed amendment to section 2 would move this nation in precisely the opposite direction. Considerations of race and color would become omnipresent and dominant. In the view of the subcommittee, this is inconsistent with either the purpose or the spirit of the Fourteenth and Fifteenth Amendments to the Constitution.

In conclusion, the subcommittee believes that the House-proposed amendments to the Voting Rights Act run substantially afoul of the provisions of the Constitution. On those grounds alone, they should be rejected.

IX. Recommendations and Section-by-Section Analysis

The Subcommittee on the Constitution recommends to the full Committee on the Judiciary a ten-year extension of the temporary provisions of the Voting Rights Act without amendment. This would represent the longest extension of these provisions in the history of the Voting Rights Act. In particular, the subcommittee would recommend the retention of the intent standard in place of the new results standard adopted in the House-approved measure, and the extension of the preclearance procedure to covered jurisdictions for a period of ten years, rather than the permanent extension of these provisions adopted in the House-approved measure.[236] While there is substantial sentiment on the subcommittee in favor of the development of a "reasonable" bail-out mechanism for jurisdictions that have comported themselves in a non-discriminatory manner for a sustained period of time, the subcommittee has not proposed a bail-out provision at this time because of the substantial disagreement existing as to the constitution of a "reasonable" bail-out provision. Apart from its conclusion that the House-approved measure contains a wholly unreasonable bail-out, the subcommittee is not opposed to the development of a fair bail-out mechanism at some subsequent stage of the legislative process. Under no circumstances, however, does it believe that the preclearance procedure should be made permanent.

Apart from the section 2 issue and the bail-out issue, several other matters of controversy were raised before the subcommittee. While there is sympathy among a number of members of the subcommittee for changes in law in these areas, it has nevertheless recommended that present law be maintained intact in order not to upset the consensus in behalf of that law.

One of these matters is the question of the continuing requirement under section 203(b) of the Act that certain jurisdictions be required

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[236] This recommendation comports with the recommendations made by many leaders in the civil rights community during the House hearings. Benjamin Hooks, Executive Director of the NAACP, testified for example.

> We support the extension of the Voting Rights Act as it is now written . . . . The Voting Rights Act is the single most effective legislation drafted in the last two decades . . . . I have not seen any changes that were anything but changes for changes sake . . . . It would be best to extend it in its present form. House Hearings, May 6, 1981, at 58, 60, 65.

Cf. also, remarks during House Hearings e.g. by Ralph Abernathy, Former Executive Director, Southern Christian Leadership Conference; Ruben Bonilla, National President. League of United Latin American Citizens; Vernon Jordan, Executive Director, Urban League ("if it ain't broke don't fix it"); Coretta Scott King; Lane Kirkland, President, AFL–CIO.

to provide bilingual registration and election materials.[237] Senator Hayakawa testified against retaining this section. He cited various instances of the costs mandated by this provision noting that, in 1980, for example, the State of California spent $1.2 million on bilingual election materials.[238] Other witnesses urged the retention of this provision, as did the Administration.[239]

Another matter raised by several witnesses related to venue in preclearance and bail-out suits. Venue in such cases is currently restricted to the U.S. District Court for the District of Columbia. Former Attorney General Griffin Bell noted, for example, with respect to such restricted venue:

> It is a departure from the equal protection of the law and a disparagement which stigmatizes judges in the regions covered by the Act to require that relief be sought only from judges in the District of Columbia.[240]

Other witnesses, however, argued in behalf of retention of the present venue provisions.[241]

The final matter raised by some witnesses during the hearings related to whether or not a political subdivision of a state should be permitted to bail-out as a separate unit, apart from a covered state itself. In a recent Supreme Court decision,[242] section 4 of the Act was construed to require that a political jurisdiction within a state be permitted to bail-out only as part of a general state bail-out. Again, the subcommittee chose to retain current law.

Changes in existing law made by the bill, as reported, are shown as follows: existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law with respect to which no change is proposed is shown in roman.

VOTING RIGHTS ACT OF 1965

PUBLIC LAW 89–110, 79 STAT 437

AN ACT To enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes

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[237] See supra note 117.

[238] Senator Hayakawa also observed that the Bureau of the Census identifies minority population groups by surname,

> Now that does not necessarily mean that the individual with a Spanish surname or a Japanese surname cannot read, write, and speak English. Some have been rooted here for generations and know only English. . . . Nowhere in the triggering mechanism is a person's ability to speak English addressed. Nowhere does the Act require that a bilingual ballot be furnished only if the voter cannot use the English language, whatever his surname may be. Senate Hearings, February 4, 1982, U.S. Senator S. I. Hayakawa.

See also House Hearings, June 23, 1981, Mary Estill Buchanan, Secretary of State, Colorado.

[239] See, e.g., Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund; February 25, 1982, Arnoldo Torres, Executive Director, League of United Latin American Citizens; February 4, 1982, William Clements, Governor of Texas.

[240] Letter to the Senate Subcommittee on the Constitution from Griffin Bell, former Attorney General of the United States, March 4, 1982. See also Senate Hearings, January 28, 1982, U.S. Senator Thad Cochran.

[241] See, e.g., Senate Hearings, January 27, 1982, Benjamin Hooks, Executive Director, NAACP; February 11, 1982, Dr. Arthur Fleming, Chairman, U.S. Commission on Civil Rights ("I think that Congress was wise in the beginning to decide that there were certain issues that could be more appropriately decided by a court here in the District of Columbia.")

[242] *City of Rome* v. *United States*, 446 U.S. 156, 167 (1980). A related question is, of course, whether or not a state can bail-out independently of any political jurisdictions within it. The proposed House measure would bar a state from bail-out unless all of its counties were also able to meet the bail-out standards. The logic here is difficult to understand since, by the same line of reasoning, those states in which only a handful of counties are covered, e.g. California, New York, Massachusetts, should be covered as states by virtue of that fact.

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [seventeen] *twenty-seven* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [seventeen] *twenty-seven* years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [ten] *seventeen* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [ten] *seventeen* years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the [seventeen]

twenty-seven years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the [ten] *seventeen* years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) he shall be consent to the entry of such judgment.

* * * * * * *

SEC. 203. (a) The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices and by prescribing other remedial devices.

(b) Prior to August 6 [1985] *1992*, no State or political subdivision shall provide registration or voting notices, forms, instruction, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate: *Provided*, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the statewide population of voting age citizens. For purposes of this subsection, illiteracy means the failure to complete the fifth primary grade. The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

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X. CONCLUSION

For the foregoing reasons, the Committee on the Judiciary's Subcommittee on the Constitution recommends the enactment of the subject bill extending intact the Voting Rights Act of 1965.

XI. COST ESTIMATE

Pursuant to section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91-510), the subcommittee estimates that there will be minimal costs to the Federal Government resulting from the passage of this legislation.

ATTACHMENT A

Questions and Answers: Intent v. Result

The Voting Rights Act debate will focus upon a proposed change in the Act that involves one of the most important constitutional issues to come before Congress in many years. Involved in this debate are fundamental issues involving the naure of American representative democracy, federalism, civil rights, and the separation of powers. The following are questions and answers pertaining to this proposed change. It is not a simple issue.

What is the major issue involved in the present Voting Rights Act debate?

The most controversial issue is whether or not to change the standard in section 2 by which violations of voting rights are identified from the present "intent" standard to a "results" standard. There is virtually no opposition to extending the provisions of the Act or maintaining intact the basic protections and guarantees of the Act.

Who is proposing to change the section 2 standard?

Although the popular perception of the issue involved in the Voting Rights Act debate is whether or not civil rights advocates are going to be able to preserve the present Voting Rights Act, the section 2 issue involves a major change in the law proposed by some in the civil rights community. Few are urging any retrenchment of existing protections in the Voting Rights Act. The issue rather is whether or not expanded notions of civil rights will be incorporated into the law.

What is section 2?

Section 2 is the statutory codification of the 15th Amendment to the Constitution. The 15th Amendment provides that the right of citizens to vote shall not be denied or abridged "on account of" race or color. There has been virtually no debate over section 2 in the past because of its noncontroversial objectives.

Does section 2 apply only to "covered" jurisdictions?

No. Because it is a codification of the 15th Amendment, it applies to all jurisdictions across the country, whether or not they are a "covered" jurisdiction that is required to "pre-clear" changes in voting laws and procedures with the Justice Department under section 5 of the Act.

What is the relationsip between section 2 and section 5?

Virtually none. Section 5 requires jurisdiction with a history of discrimination to "preclear" all proposed changes in their voting laws and procedures with the Justice Department. Section 2 restates the 15th Amendment and applies to all jurisdictions; it is not limited either, as is section 5, to *changes* in voting laws or procedures. Existing laws and procedures would be subject to section 2 scrutiny as well as changes in these laws and procedures.

What is the present law with respect to section 2?

The law with respect to the standard for identifying section 2 (or 15th Amendment) violations has always been an intent standard. As the Supreme Court reaffirmed in a decision in 1980, "That Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race or color." *Mobile* v. *Bolden* 446 U.S. 55.

Did the Mobile case enact any changes in existing laws?

No. The language in both the 15th Amendment and section 2 proscribes the denial of voting rights "on account of" race or color. This has always been interpreted to require purposeful discrimination. Indeed, there is no other kind of discrimination as the term has traditionally been understood. Until the *Mobile* case, it was simply not at issue that the 15th Amendment and section 2 required some demonstration of discriminatory purpose. There is no decision of the Court either prior to or since *Mobile* that has ever required anything other than an "intent" standard for the 15th Amendment or section 2.

Hasn't the Supreme Court utilized a results test prior to the Mobile decision?

No. The Supreme Court has never utilized a results (or an "effects" test) for identifying 15th Amendment violations. While proponents often refer to the decision of the Court in *White* v. *Regester* 412 U.S. 755 to argue the contrary, this is simply not the case. *White* was not a section 2 case and it was not a 15th Amendment case—it was a 14th Amendment case. Further, *White* required discriminatory purpose even under the 14th Amendment. That *White* required purpose was reiterated by the Court in *Mobile* and, indeed, it was reiterated by Justice White in dissent in *Mobile*. Justice White was the author of the *White* v. *Regester* opinion. The term results appears nowhere in *White* v. *Regester*. There is no other court decision either utilizing a results test under section 2 or the Fifteenth Amendment.

What is the standard for the 14th amendment's equal protection clause?

The intent standard has always applied to the 14th amendment as well. In *Arlington Heights* v. *Metropolitan Authority*, the Supreme Court stated, "Proof of a racially discriminatory intent or purpose is required to show a violation of the equal protection clause of the 14th amendment." 429 U.S. 253 (1977). This has been reiterated in a number of other decisions, *Washington* v. *Davis*, 426 U.S. 229 (1976); *Massachusetts* v. *Feeney*, 442 U.S. 256 (1979). In addition, the Court has always been careful to emphasize the distinction between de facto and de jure discrimination in the area of school busing. Only de jure (or purposeful) discrimination has ever been a basis for school busing orders. *Keyes* v. *Denver*, 413 U.S. 189 (1973).

What precisely is the "intent" standard?

The intent standard simply requires that a judicial fact-finder evaluate all the evidence available to himself on the basis of whether or not it demonstrates some intent or purpose or motivation on the part of the defendant to act in a discriminatory manner. It is the traditional test for identifying discrimination.

Does it require express confessions of intent to discriminate?

No more than a criminal trial requires express confessions of guilt. It simply requires that a judge or jury be able to conclude on the basis of all the evidence available to it, including circumstantial evidence of whatever kind, that some discriminatory intent or purpose existed on the part of the defendant. Several major cases since *Mobile* have had no difficulty finding purposeful discrimination without a "smoking gun" or express confessions of intent.

Then it does not require "mind-reading" as some opponents of the "intent" standard have suggested?

Absolutely not. "Intent" is proven without "mind-reading" thousands of times every day of the week in criminal and civil trials across the country. Indeed, in criminal trials the existence of intent must be proven "beyond a reasonable doubt." In the civil rights area, the normal test is that intent be proven merely "by a preponderance of the evidence."

How can the intent of long-dead legislators be determined under the present test?

This has never been necessary under the 15th amendment. It is irrelevant what the intent may have been of "long-dead" legislators if the alleged discriminatory action is being maintained wrongfully by present legislators.

What kind of evidence can be used to demonstrate "intent"?

Again, literally any kind of evidence can be used to satisfy this requirement. As the Supreme Court noted in the *Arlington Heights* case, "Determining whether invidious discriminatory purposes was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available. 429 U.S. 253, 266. Among the specific considerations that it mentions are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedures, legislative history, the impact of a decision upon minority groups, etc.

Do you mean that the actual impact or effects of an action upon minority groups can be considered under the intent test?

Yes. Unlike a results or effects-oriented test, however, it is not dispositive of a voting rights violation in and of itself, and it cannot effectively shift burdens of proof in and of itself. It is simply evidence of whatever force it communicates to the factfinder.

Why are some proposing to substitute a new "results" test in section 2?

Ostensibly, it is argued that voting rights violations are more difficult to prove under an intent standard than they would be under a results standard.

How important should that consideration be?

Completely apart from the fact that the Voting Rights Act has been an effective tool for combating voting discrimination under the present standard, it is debatable whether or not an appropriate standard should be fashioned on the basis of what facilitates success-

ful prosecutions. Elimination of the "beyond a reasonable doubt" standard in criminal cases, for example, would certainly facilitate criminal convictions. The Nation has chosen not to do this because there are competing values, e.g. fairness and due process.

What is wrong with the results standard?

First of all, it is totally unclear what the "results" standard is supposed to represent. It is a standard totally unknown to present law. To the extent that its legislative history is relevant, and to the extent that it is designed to resemble an effects test, the main objection is that it would establish as a standard for identifying section 2 violations a "proportional representation by race" standard.

What is meant by "proportional representation by race"?

The "proportional representation by race" standard is one that evaluates electoral actions on the basis of whether or not they contribute to representation in a State legislature or a City Council or a County Commission or a School Board for racial and ethnic groups in proportion to their numbers in the population.

What is wrong with "proportional representation by race"?

It is a concept totally inconsistent with the traditional notion of American representative government wherein elected officials represent individual citizens not racial or ethnic groups or blocs. In addition, as the Court observed in *Mobile*, the Constitution "does not require proportional representation as an imperative of political organization." As Madison observed in the Federalist No. 10, a major objective of the drafters of the Constitution was to limit the influence of "factions" in the electoral process.

Compare then the intent and the results tests?

The intent test allows courts to consider the totality of evidence surrounding an alleged discriminatory action and then requires such evidence to be evaluated on the basis of whether or not it raises an inference of purpose or motivation to discriminate. The results test, however, would focus analysis upon whether or not minority groups were represented proportionately or whether or not some change in voting law or procedure would contribute toward that result.

What does the term "discriminatory results" mean?

It means nothing more than is meant by the concept of racial balance or racial quotas. Under the results standard, actions would be judged, pure and simple, on color-conscious grounds. This is totally at odds with everything that the Constitution has been directed towards since the Reconstruction Amendments, *Brown* v. *Board of Education*, and the Civil Rights Act of 1964. The term "discriminatory results" is Orwellian in the sense that it radically transforms the concept of discrimination from a process or a means to an end into a result or end in itself. The results test would outlaw actions with a "disparate impact"; this has virtually nothing to do with the notion of discrimination as traditionally understood.

Isn't the "proportional representation by race" description an extreme description?

Yes, but the results test is an extreme test. It is based upon Justice Thurgood Marshall's dissent in the *Mobile* case which was described

by the Court as follows: "The theory of this dissenting opinion . . . appears to be that every 'political group' or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its numbers." The House Report, in discussing the proposed new "results" test, admits that proof of the absence of proportional representation "would be highly relevant".

But doesn't the proposed new section 2 language expressly state that proportional representation is not its objective?

There is, in fact, a disclaimer provision of sorts. It is clever, but it is a smokescreen. It states, "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

Why is this language a "smokescreen"?

The key, of course, is the "in and of itself" language. In *Mobile*, Justice Marshall sought to deflect the "proportional representation by race" description of his results theory with a similar disclaimer. Consider the response of the Court, "The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of 'historical and social factors' indicating that the group in question is without political influence. Putting to the side the evident fact that these guazy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete group that happens for whatever reason, to elect fewer of its candidates than arithmetic indicates that it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the 'inequitable distribution of political influence'."

Explain further?

In short, the point is that there will always be an additional scintilla of evidence to satisfy the "in and of itself" language. This is particularly true since there is no standard by which to judge any evidence except for the results standard.

What additional evidence, along with evidence of the lack of proportional representation, would suffice to complete a section 2 violation under the results test?

Among the additional bits of "objective" evidence to which the House Report refers are a "history of discrimination", "racially polarity voting" (sic), at-large elections, majority vote requirements, prohibitions on single-shot voting, and numbered posts. Among other factors that have been considered relevant in the past in evaluating submissions by "covered" jurisdictions under section 5 of the Voting Rights Act are disparate racial registration figures, history of English-only ballots, maldistribution of services in racially definable neighborhoods, staggered electoral terms, some history of discrimination, the existence of dual school systems in the past, impediments to third party voting, residency requirements, redistricting plans which fail

to "maximize" minority influence, numbers of minority registration officials, re-registration or registration purging requirements, economic costs associated with registration, etc., etc.

These factors have been used before?

Yes. In virtually every case, they have been used by the Justice Department (or by the courts) to ascertain the existence of discrimination in "covered" jurisdictions. It is a matter of one's imagination to come up with additional factors that could be used by creative or innovative courts or bureaucrats to satisfy the "objective" factor requirement of the "results" test (in addition to the absence of proportional representation). Bear in mind again that the purpose or motivation behind such voting devices or arrangements would be irrelevant.

Summarize again the significance of these "objective" factors?

The significance is simple—where there is a State legislature or a city council or a county commission or a school board which does not reflect racial proportions within the relevant population, that jurisdiction will be vulnerable to prosecution under section 2. It is virtually inconceivable that the "in and of itself" language will not be satisfied by one or more "objective" factors existing in nearly any jurisdiction in the country. The existence of these factors, in conjunction with the absence of proportional representation, would represent an automatic trigger in evidencing a section 2 violation. As the *Mobile* court observed, the disclaimer is "illusory".

But wouldn't you look to the totality of the circumstances?

Even if you did, there would be no judicial standard for evaluation other than proportional representation. The notion of looking to the totality of circumstances is meaningful only in the context of some larger state-of-mind standard, such as intent. It is a meaningless notion in the context of a result-oriented standard. After surveying the evidence under the present standard, the courts ask themselves, "Does this evidence raise an inference of intent?" Under the proposed new standard, given the absence of proportional representation and the existence of some "objective" factor, a prima facie (if not an irrebuttable) case has been established. There is no need for further inquiries by the court. There is no ultimate, threshold question for the courts.

Where would the burden of proof lie under the "results" test?

Given the absence of proportional representation and the existence of some "objective" factor, the effective burden of proof would be upon the defendant community. Indeed, it is unclear what kind of evidence, if any, would suffice to overcome such evidence. In *Mobile*, for example, the absence of discriminatory purpose and the existence of legitimate, non-discriminatory reasons for the at-large system of municipal elections was not considered relevant evidence by either the plaintiffs or the lower Federal courts.

Putting aside the abstract principle for the moment, what is the major objective of those attempting to over-rule "Mobile" and substitute a "results" test in section 2?

The immediate purpose is to allow a direct assault upon the majority of municipalities in the country which have adopted at-large sys-

tems of elections for city councils and county commissions. This was the precise issue in *Mobile*, as a matter of fact. Proponents of the results test argue that at-large elections tend to discriminate against minorities who would be more capable of electing "their" representatives to office on a district or ward voting system. In *Mobile*, the Court refused to dismantle the at-large municipal form of government adopted by the city.

Do at-large systems of voting discriminate against minorities?

Completely apart from the fact that at-large voting for municipal governments was instituted by many communities in the 1910's and 1920's in response to unusual instances of corruption within ward systems of government, there is absolutely no evidence that at-large voting tends to discriminate against minorities. That is, unless the premise is adopted that only blacks can represent blacks, only whites can represent whites, and only hispanics can represent hispanics. Indeed, many political scientists believe that thec reation of black wards or hispanic wards, by tending to create political "ghettoes", minimize the influence of minorities. It is highly debatable that black influence, for example, is enhanced by the creation of a single 90-percent black ward (that may elect a black person) than by three 30-percent black wards (that may each elect white persons all of whom will be influenced significantly by the black community).

What else is wrong with the proposition that at-large elections are constitutionally invalid?

First, it turns the traditional objective of the Voting Rights Act—equal access to the electoral process—on its head. As the Court said in *Mobile*, "this right to equal participation in the electoral process does not protect any political group, however defined, from electoral defeat." Second, it encourages political isolation among minority groups; rather than having to enter into electoral coalitions in order to elect candidates favorable to their interests, ward-only elections tend to allow minorities the more comfortable, but less ultimately influential, state of affairs of safe, racially identifiable districts. Third, it tends to place a premium upon minorities remaining geographically segregated. To the extent that integration occurs, ward-only voting would tend not to result in proportional representation. To summarize again by referring to *Mobile*, "political groups do not have an independent constitutional claim to representation."

What would be the impact of a constitutional or statutory rule proscribing at-large municipal elections?

The impact would be profound. In *Mobile*, the plaintiffs sought to strike down the entire form of municipal government adopted by the city on the basis of the at-large form of city council election. The Court stated, "Despite repeated attacks upon multi-member (at-large) legislative districts, the Court has consistently held that they are not unconstitutional." If *Mobile* were over-ruled, the at-large electoral structures of the more than two-thirds of the 18,000+ municipalities in the country that have adopted this form of government, would be placed in serious jeopardy.

What will be the impact of the results test upon redistricting and reapportionment?

Redistricting and reapportionment actions also will be judged on the basis of proportional representation analysis. As Dr. W. F. Gibson, the President of the South Carolina NAACP, recently observed about proposed legislative redistricting in that State, "Unless we see a redistricting plan that has the possibility of blacks having the probability of being elected in proportion to this population, we will push hard for a new plan." Similarly, the Reverend Jesse Jackson has stated, "Blacks comprise one-third of South Carolina's population and they deserve one-third of its representation." Former Assistant Attorney General for Civil Rights Drew Days has conceded that minority groups alone will be largely immune to partisan or ideological gerrymandering on the grounds of "vote dilution".

What is "vote dilution"?

The concept of "vote dilution" is one that has been responsible for transforming other provisions of the Voting Rights Act (esp. section 5) from those designed to ensure equal access by minorities to the registration and voting processes into those designed to ensure equal electoral outcome. The right to register and vote has been significantly transformed in recent years into the right to cast an "effective" vote and the right of racial or ethnic groups not to have their collective vote "diluted". See, e.g., Thernstrom, "The Odd Evolution of the Voting Rights Act", 55 *The Public Interest* 49. Determining whether or not a vote is "effective" or "diluted" is generally determined simply by proportional representation analysis.

Are there other constitutional issues involved with section 2?

Yes. Given that the Supreme Court has interpreted the 15th Amendment to require a demonstration of purposeful discrimination in order to establish a constitutional violation, and given that the Voting Rights Act is predicated upon the 15th Amendment, there are serious constitutional questions involved as to whether or not Congress in section 2 can re-interpret the parameters of the 15th Amendment by simple statute. Similar constitutional questions are involved in pending efforts by the Congress to statutorily overturn the Supreme Court's abortion decision in *Roe* v. *Wade*. As former Attorney General Griffin Bell has observed, "To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government."

What is the position of the administration on the section 2 issue?

The administration and the Justice Department are strongly on record as favoring retention of the intent standard in section 2. President Reagan has expressed his concern that the results standard may lead to the establishment of racial quotas in the electoral process. Press Conference, December 17, 1981. Attorney General William French Smith has expressed similar concerns.

Summarize the section 2 issue?

The debate over whether or not to overturn the Supreme Court's decision in *Mobile* v. *Bolden*, and establish a results test for iden-

tifying voting discrimination in place of the present intent test, is probably the single most important constitutional issue that will be considered by the 97th Congress. Involved in this controversy are fundamental issues involving the nature of American representative democracy, federalism, the division of powers, and civil rights. By redefining the notion of "civil rights" and "discrimination" in the context of voting rights, the proposed "results" amendment would transform the objective of the Act from equal access to the ballot-box into equal results in the electoral process. A results test for discrimination can lead nowhere but to a standard of proportional representation by race.

ATTACHMENT B

Selected Quotes on Section 2 and Proportional Representation

"The theory of the dissenting opinion ["results" test] . . . appears to be that every political group or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its members . . . The Equal Protection Clause does not require proportional representation as an imperative of political organization."—U.S. Supreme Court, *Mobile* v. *Bolden* (1980)

"The fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population . . . would be highly relevant [under the proposed amendment.]"—House Report 97–227 (Voting Rights Act)

"[Under the new test] any voting law or procedure in the country which produces election results that fail to mirror the population's make-up in a particular community would be vulnerable to legal challenge . . . if carried to its logical conclusion, proportional representation or quotas would be the end result."—U.S. Attorney General William French Smith

"To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government."—Former U.S. Attorney General Griffin Bell

"A very real prospect is that this amendment could well lead us to the use of quotas in the electoral process . . . We are deeply concerned that this language will be construed to require governmental units to present compelling justification for any voting system which does not lead to proportional representation."—Asst. Attorney General (Civil Rights) William Bradford Reynolds

"Blacks comprise one-third of South Carolina's population and they deserve one-third of its representation."—Rev. Jesse Jackson, Columbia State, October 25, 1981

"The amendment must invariably operate . . . to create racially defined wards throughout much of the nation and to compel the worst tendencies toward race-based allegiances and divisions."—Prof. William Van Alstyne, Univ. of Calif. School of Law

"The logical terminal point of those challenges [to *Mobile*] is that election districts must be drawn to give proportional representation to minorities."—Washington Post, April 28, 1980

"It seems to me that the intent of the amendment is to ensure that blacks or members of other minority groups are ensured proportional representation. If, for example, blacks are 20 percent of the population of a State, Hispanics 15 percent, and Indians 2 percent, then at least 20 percent of the members of the legislature must be black, 15 percent Hispanic and 2 percent Indian."—Prof. Joseph Bishop, Yale Law School

"The amendment is intended to reverse the Supreme Court's decision in *Mobile* . . . if adopted, this authorizes Federal courts to require States to change their laws to ensure that minorities will be elected in proportion to their numbers . . . Representative government does not imply proportional representation."—Dr. Walter Berns, American Enterprise Institute

"Unless we see a redistricting plan that has the possibility of blacks having the probability of being elected in proportion to this population in South Carolina, we will push hard for a new plan."—Dr. W. F. Gibson, President, South Carolina NAACP

"Only those who live in a dream world can fail to perceive the basic thrust and purpose and inevitable result of the new section 2: it is to establish a pattern of proportional representation, now based upon race—perhaps at a later moment in time upon gender or religion or nationality."—Prof. Henry Abraham, University of Virginia

"I may state unequivocally for the NAACP and for the Leadership Conference on Civil Rights that we are not seeking proportional representation . . . I think there is a big difference between proportional representation and representation in the population in proportion to [minority] population."—Benjamin Hooks, Executive Director, NAACP

"What the courts are going to have to do under the new test is to look at the proportion of minority voters in a given locality and look at the proportion of minority representatives. That is where they will begin their inquiry and that is very likely where they will end their inquiry. We will have ethnic or racial proportionality."—Prof. Donald Horowitz, Duke University Law School

"It would be difficult to imagine a political entity containing a significant minority population that was not represented proportionately that would not be in violation of the new section."—Prof. Edward Erler, National Humanities Center

"[The results test would require] dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative."—Wall Street Journal, January 15, 1982

"Equal access does not mean equal results . . . [Under the amendment] proportionate results have become the test of discrimination."—Dr. John Bunzel, Hoover Institution (Stanford University)

"The very language of the amendment proposed for Section 2 imports proportional representation into the Act where it did not exist before."—Prof. Barry Gross, City College of New York

"By making sheer numerical outcome 'highly relevant' as to the legality of a procedure, the House bill moves to replace the outcome of the voting as the final arbiter by another standard—proportionality. This is not consistent with democracy."—Prof. Michael Levin, City College of New York

"The proof [of discrimination under the amended section 2] is the number of people who get elected."—U.S. Rep. Robert Garcia (New York)

ADDITIONAL VIEWS OF SENATOR PAUL LAXALT

Though I have concerns about several provisions of S. 1992 as reported by the Judiciary Committee, these Views will be limited to the changes to section 2 of the Voting Rights Act. The modifications made by the Judiciary Committee in the provisions of S. 1992 amending section 2 of the Voting Rights Act were circumscribed by a combination of what most members considered to be politically possible, in the context of Committee action, with extraordinarily sophisticated issues of law. The two variations of amendments to section 2—that is, S. 1992 as originally introduced and the House bill, H.R. 3112, on the one hand, and S. 1992 as reported by the Judiciary Committee on the other—have only one purpose, to overturn the Supreme Court's interpretation of the 15th Amendment to the Constitution as expressed in the recent case of *Mobile* v. *Bolden*, 446 U.S. 55 (1980). Any simple statement to the contrary notwithstanding, the statements of the sponsors of H.R. 3112 and S. 1992, the hearing records, the debate in the Judiciary Committee, and the bulk of this Report, all clearly show that the perceived impact of *Mobile* v. *Bolden* was the provocation for changing the language of section 2 and overturning *Mobile* v. *Bolden* was the undisguised goal of the changes adopted.

I voted for these changes knowing this to be the case. However, I do not share the understanding of the *Mobile* case expressed in this Report. The so-called "intent" standard articulated in *Mobile* was neither an unprecedented departure from previous law or from Congress' understanding of that law, nor was it some new, unusually high threshold for successfully challenging voting discrimination based on race.

Furthermore, I believe that the language for section 2 passed by the House, (the "results" standard) not only was unwarranted, but would unavoidably "result" in proportional representation by race, merely a variant—and an equally contemptible variant—of the bigotry to which minority citizens have been subjected. Such a statute would be, in my view, unconstitutional. I reach this conclusion not because Congress may not act on an interpretation of the Constitution different from one espoused by the Supreme Court, for Congress clearly may; but because this result of mandated proportional representation is itself an unconstitutional abridgment of the right to vote, in the words of the 15th Amendment, "on account of race."

Thus, I voted for the language ultimately adopted by the Judiciary Committee because I felt it was an improvement over the House language, and because this language was the only proposal available which had a chance to pass the Committee. Furthermore, since I support an extension of those provisions of the Voting Rights Act designed to have a temporary application, I was favorably disposed toward any reasonable improvement in the House language which would allow an extension to move forward in the legislative process.

However, due to the seriousness of my objections to the House version, a mere cosmetic change in the House language would not have justified my support for what ultimately became the Judiciary Committee's language. This language, proposed by Senator Dole, allays my concerns not only because of its explicit language disavowing a right to proportional representation, but also because, upon close study, it responds to a feeling I have had for some time concerning the debate over this legislation. Quite simply, the choice before us was not limited to the "intent" test versus the "results" test. Senator Dole's proposal, now the language of S.1992 as reported by the Judiciary Committee, ingeniously, and admittedly with some complexity, establishes a standard for voting rights discrimination which can be fairly said to be a third alternative between the "intent" and "results" poles.

THE APPARENT AMBIGUITY OF THE LANGUAGE ADOPTED

When observed exclusively from an "intent" test perspective or from a "results" test perspective, the approach taken by the Judiciary Committee for section 2 is ambiguous, at best. The language of subsection (a) alone combines words classicly evidencing a "results" test and others suggesting more of an "intent" orientation. The subsection speaks of a voting practice which "results" in a denial of the right to vote (obviously, the "results" test), but "on account of" race, color, etc. (suggesting purpose, or at the very least the conscious targeting of a voting practice).

If one looks at the Committee's consideration of this provision more broadly, but again rigorously trying to pigeonhole the ultimate product as an "intent" or "results" test, the confusion is compounded. The Dole proposal was advanced as a codification of the analytical style of *White* v. *Regester*, 412 U.S. 775 (1973). (I say "analytical style" because, since *White* was a 14th Amendment Equal Protection Clause case, and not a Voting Rights Act or 15th Amendment case, it would be inappropriate to say that the language adopted by the Committee codifies the rule of *White* v. *Regester*.) The proponents explained that *White* was not an "intent" case, but employed a reasonable analysis not tending to the extremes feared by those who objected to a straight "results" approach.

White may indeed not be an "intent" case in the sense that the Court did not clearly discuss discriminatory intent as a necessary element of the case, but *White* is certainly not a straight "results" case either. The *White* Court was quite clear in its affirmation of the lower court's holding:

> The District Court apparently paid due heed to *Whitcomb* v. *Chavis*, *supra*, did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from it own special vantage point, conclude that the multimember district, as *designed* and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of

> history and an intensely local appraisal of the *design* and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise. *Id.* at 769–70 (emphasis added).

This combination of "design" and "impact" or "operation" may in the view of some fall short of the "intent" standard employed in *Mobile* v. *Bolden*. Yet obviously the analysis of the *White* Court did not turn solely on an evaluation of the impact of the voting practice involved, unencumbered by any examination of the purpose (i.e., the "design") of that practice.

In short, trying to understand what the language adopted by the Committee means only in terms of the "intent" or the "results" test is bound to produce frustration and little comprehension. What the Committee did—and the only way this provision can be consistently understood—is to develop, perhaps inadvertantly, a third approach, which I, for want of a better formula, call the "objective design" standard.

THE OBJECTIVE DESIGN STANDARD

The standard embodied in the section 2 language reported by the Judiciary Committee follows the analysis of *White* v. *Regester* in that it looks to the design and results of a voting practice to determine if it violates the Voting Rights Act. The "design" element here is not, I believe, equivalent to the "intent" test as it has been characterized by those favoring the "results" test. That is, a discriminatory design is not a function of the actual subjective intent of the decisionmakers who put the particular challenged voting practice in place.

Rather, this standard inextricably links "design" and "results" in an effort to formulate a relatively objective, uniform test for unlawful discrimination in voting matters. In the words of subsection (b) of section 2, it looks to the "totality of circumstances" surrounding a voting practice, including the impact of that practice, to determine if a reasonable observer could conclude that the practice results in the denial or abridgment of the right to vote "on account of" race.

This standard can be understood by an analogy to the familiar "reasonable man" standard by which tort law evaluates negligence. The following quotation from the classic treaties by William Prosser, *Handbook of the Law of Torts*, serves to illustrate this point:

> The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to

> the actor, for his capacity to meet it, and for the circumstances under which he must act.
>
> The courts have dealt with this very difficult problem by creating a fictitious person, who never has existed on land or sea; the "reasonable man of ordinary prudence." W. Prosser, *Handbook of the Law of Torts* 149–50 (4th ed. 1971).

So, too, the theory that some voting qualifications can be invidiously discriminatory presupposes that there are voting qualifications which are not *invidiously* discriminatory and that there can be a uniform standard for invidiousness. "Discrimination," by itself, is not invidious or unlawful. By definition, any "qualification," whether for voting or for a license to practice medicine, "discriminates" between people. For example, our voting laws "discriminate" against noncitizens insofar as being a citizen as a qualification for voting. The critical question is whether a particular qualification is held to be invidious, and therefore unlawful.

The race of a citizen is one characteristic which we hold to be an invidious qualification for access to the ballot box. Race is an invidious characteristic in this situation because under our morality and law it demonstrates nothing of relevance regarding whether a citizen should be allowed to cast a ballot or not. In the words of Professor Hadley Arkes of Amherst:

> No moral inference can be made about a man merely from knowing his race. We cannot say, therefore, merely on the basis of race, that any man deserves benefits or disabilities; that he deserves to pay higher taxes or to receive reparations.

The standard for determining whether this invidious qualification has been used to establish a voting practice, and therefore whether the practice is unlawful, must, borrowing the words of Prosser, "be an external and objective one, rather than [depend on] the individual judgment, good or bad, of the particular actor." What is established by this revision of section 2 is a standard of *objective* design or purpose, meaning that a court confronted with a voting rights claim will not look to the particular subjective intent of the decisionmaker involved. Rather, a court will subject the "totality of circumstances" surrounding a challenged voting practice to the more uniform and objective query: "What could have been the primary purpose of a hypothetical, reasonable man in putting such a practice into operation?" Consequently, if a court concludes that a reasonable man would have had an invidiously discriminatory design in establishing a particular voting qualification, the actual defendant could not interpose a defense that the whole scheme was accidental.

Yet because invidious discrimination, under the terms of the Voting Rights Act, at its core is based on some sense of purpose or design—to discriminate against certain citizens on account of their race or membership in certain language minorities—the objective standard to be employed cannot look merely to the impact of a particular voting qualification. Even if one uses the "results" terminology employed in the body of this Report, section 2 of the Voting Rights Act concerns itself only with "results"—unequal access to the ballot box—imposed on citizens *by virtue of* their race or membership in certain language

groups, the only characteristics by which citizens can be classified as a "minority" for purposes of the Voting Rights Act. Indeed, as this Report observes, "Section 2 protects the right of minority voters to be free from election practices, procedures or methods, which deny them the same opportunity to participate in the political process *as other citizens enjoy*." (Emphasis added.) Paradoxically then, even a "results" characterization of this section 2 standard cannot avoid the design element at the root of this standard: section 2 remedies voting practices or qualifications discriminating among citizens because of their race or membership in certain language groups, *not* voting practices or qualifications discriminating between citizens because they are Democrats or Republicans, or are urban dwellers or suburbanites, or because of any other characteristic, whether that other characteristic is invidious or not. The Voting Rights Act—including this new language for section 2—attacks the invidious use of the characteristics of race and certain ethnic origins, and these characteristics alone, to discriminate between voters in their access to the ballot box.

In addition, giving some role to design in these matters is the only way to give effect to the express intentions of the drafters of the section 2 language adopted by the Committee: to codify the analysis of *White* v. *Regester* and to ensure that proportional representation does not become a standard for Voting Rights Act violations. Further, I question the constitutionality of any statute intended to enforce the 15th Amendment which does not incorporate some element of design.

Justice Stevens' separate opinion in the *Mobile* case, in which he concurred in the judgment, comes close to articulating this objective design standard. While he does "not believe that it is appropriate to focus on the subjective intent of the decisionmakers," 446 U. S. at ——, his preferred three-part standard for determining whether a challenged voting practice violates the law includes whether the practice "was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority." *Id.* at ——.

CONCLUSION

In sum, I believe this "objective design" standard is the only theory I have seen which coherently binds the apparently inconsistent threads of this new section 2 language. It accomplishes what the drafters of this language say they want to accomplish, and prevents consequences they say they wish to avoid. It is analogous to classic forms of legal analysis in our jurisprudence. Finally, it is a logical general formulation of the precedents in the voting rights area.

ADDITIONAL VIEWS OF SENATOR ROBERT DOLE

The Committee Report is an accurate statement of the intent of S. 1992, as reported by the Committee. However, I would like to add a few further comments concerning the language of the substitute amendment which I offered and the Committee adopted as it relates to Section 2 of the Voting Rights Act, and in particular, what I intended that the substitute accomplish and why it was needed.

MAINTAINING THE INTEGRITY OF THE RESULTS TEST

In offering the substitute, I was guided by two key objectives. First, it was imperative to make it unequivocally clear that plaintiffs may base a violation of Section 2 on a showing of discriminatory "results", in which case proof of discriminatory intent or purpose would be neither required, nor relevant. I was convinced of the inappropriateness of an "intent standard" as the sole means of establishing a voting rights claim, as were the majority of my colleagues on the Committee. As explained more fully in the Committee Report, the basic problem with the test is that its focus is misplaced. If a voting practice or structure operates today to exclude members of a minority group from a fair opportunity to participate in the political process, the motives behind the actions of officials which took place decades before is of the most limited relevance. Further, it places an inordinate burden of proof on plaintiffs, thus frustrating vigorous enforcement efforts. It also causes divisiveness because it inevitably involves charges that the decisions of officials were racially motivated. In short, from both a policy and legal standpoint, exclusive reliance on the test is misguided and would prevent eradication of the racial discrimination which, unfortunately, still exists in the American electoral process.

ADDRESSING THE PROPORTIONAL REPRESENTATION ISSUE

While convinced of the inappropriateness of the "intent standard", however, I was also convinced that in order for this legislation to garner the broad bipartisan support which it deserved, the codification of the "results" test had to be accompanied by language which alleviated fears that the standard could be interpreted as granting a right of proportional representation. During the hearings, this was a concern expressed by many and opposition to the results test was based primarily on this fear. Yet, during the hearings a unanimous consensus was established, among both the opponents and proponents of the results test, that the test for Section 2 claims should not be whether members of a protected class have achieved proportional representation. It was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles upon which our society is based. Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress.

THE FORMULA FOR THE COMPROMISE

Accomplishment of these two key objectives—maintaining the integrity of the results test while at the same time alleviating fears about proportional representation—was achieved by dividing Section 2 into two now subsections. New subsection (a) retained the "results" language of the House Bill, thus making clear that Congress rejected the "intent" standard as the sole means of establishing a violation under Section 2. But new subsection (b) delineated with more specificity, the legal standards to be applied under the "results" test in order to address the proportional representation issue.

As explained in the Committee Report, the new subsection codifies the legal standard articulated in *White* v *Regester*, a standard which was first applied by the Supreme Court in *Whitcomb* v *Chavis*, and which was subsequently applied in some 23 Federal Courts of Appeals decisions. As expressed in the language of the subsection, the standard is whether the political processes are equally "open" in that members of a protected class have the same *opportunity* as others to participate in the political process and to elect candidates of their choice. In other words, the focus of the standard is on whether there is equal access to the political process, not on whether members of a particular minority group have achieved proportional elections results. The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive.

Thus, by relying on the plain language of the substitute amendment, as well as the precedent which the amendment is designed to make applicable, I am confident that the "results" test will not be construed to require proportional representation. Such a construction would be patently inconsistent with the express provisions of subsection (b). Further, the track record of cases decided under the *White* standard irrefutably demonstrates that a right to proportional representation was never deemed to exist under the standard, and, in fact, was consistently disavowed by the courts.

THE REVISED SECTION 2 DOES NOT INCLUDE AN ELEMENT OF INTENT

It should be reemphasized that the "results" test contained in the substitute amendment in no way includes an element of discriminatory purpose. I am aware that some have sought to characterize the *White* holding as including an ultimate purpose requirement or a so-called "objective design" element. The implication of this characterization is that because the substitute amendment codifies the *White* standard, the amendment also includes some requirement of discriminatory purpose. But in presenting my compromise before the Committee, I explicitly stated that "the supporters of this compromise believe that a voting practice or procedure which is discriminatory in result, should not be allowed to stand, regardless of whether there exists a discriminatory purpose". Further, as the Committee Report spells out, in adopting the substitute amendment, the Committee has concluded that the *White* case made no findings and required no proof as to the motivation or purpose behind the challenged voting practice.

It should be noted that prior to the Committee markup on S. 1992, numerous draft amendments were circulated to Committee members which were said to achieve, in various ways, some third, composite kind of standard, ostensibly combining both the "results" and "intent" tests. One such suggestion was that defendants be permitted to rebut a showing of discriminatory results by a showing of some nondiscriminatory purpose behind the challenged voting practice or structure. Another suggestion was that the results test of *White* be viewed as requiring plaintiffs to prove that the discriminatory result of the challenged voting practice was a reasonably forseeable consequence of its design. However, my colleagues and I who offered the substitute amendment remained convinced that Section 2 should only require plaintiffs to establish discriminatory "results" and rejected the notion that any element of purpose should be incorporated into the standard.

OTHER REVISIONS MADE BY THE SUBSTITUTE

The substitute retained the new bail-out criteria contained in the bill passed by the House, but placed a twenty-five year "time cap" on the preclearance requirement. Unlike past extensions, the provisions of new bail-out criteria will allow jurisdictions who have obeyed the law and accepted minority participation in the political process to exempt themselves from the preclearance requirement, instead of having to wait for a mere expiration date. However, because there is no longer a "mere expiration date" many perceived the new bail-out criteria as extending the special provisions of the Act in perpetuity. The time cap was included to address this concern. As explained in detail in the Committee Report, the new bail-out is fair and achievable and I anticipate that the vast majority of covered jurisdictions will be able to exempt themselves from the preclearance requirement long before the expiration of the twenty-five year period. However, if there are some recalcitrant jurisdictions still subject to Section 5 after twenty-five years, their preclearance obligations will automatically terminate unless the Congress deems that a further extension is necessary.

CONCLUSION

I believe that the Committee should be commended for the manner in which it has handled the Voting Rights Act Amendments of 1982. Many aspects of this legislation were highly controversial. Yet the Committee was able to move the Bill expeditiously through the Committee process, and report fair, and effective legislation which has commanded overwhelming bipartisan support. Credit should go to Senator Hatch, whose Constitution Subcommittee held exhaustive, well-balanced hearings on this matter which were of great assistance to Committee members in working with the complicated legal issues involved. In addition, Chairman Thurmond should be applauded for the leadership displayed throughout the Committee process. It should be noted that of the three previous occasions when the Senate Judiciary Committee has had under consideration the Voting Rights Act, only once was the Committee Chairman able to move the legislation out of the Committee. The controversial history of the Voting Rights Act underscores the feat which Chairman Thurmond has accomplished.

SUPPLEMENTAL VIEWS OF CHARLES E. GRASSLEY ON THE VOTING RIGHTS ACT

I am pleased with the measure reported by the Committee and am confident that it shall be successful in eradicating the remaining vestiges of racial discrimination in voting. I express my views not to take issue with the body of the Report, but to reflect upon the path by which this proposal was conceived. I shall confine my remarks to the Section 2 issue.

Developing the Committee bill was not a simple undertaking. The heartfelt problem in this instance was not one easily addressed by cold legalise. The compromise proposal eventually adopted by the Committee reflects the complexities and subtleties of this problem. The key to understanding the congressional intent of the new Section 2 language lies in an understanding of the essence of our solution as it developed.

Although there were hard-fought battles over the specific language of this proposal, a consensus developed in this Committee that plain and simply, effective bars to the full and fair political participation by all citizens must be removed, whether those bars are intentional or not; but that there be safeguards to guarantee that what we are banning is actual discrimination in the political processes, not disproportionate electoral outcomes, per se.

OVERVIEW OF THE HOUSE AND SENATE PROCEEDINGS

The House of Representatives recognized the delicacy of the proposed change to a "results" test in Section 2. Critics of this change raised the specter of proportional representation as the inevitable outcome of this change. While some have labeled this argument a "scare tactic" the House recognized the real threat that proportional representation could be the terminal point of the change to a simple "results" test. The House acknowledged this very real possibility and sought to prevent this abhorration with the inclusion of the so-called "disclaimer" language. The disclaimer reads as follows:

The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

The House thus recognized the distinction between a "disproportionate" result and a "discriminatory" result. The House refrained, however, from expanding upon this distinction other than to reject the notion that these standards were somehow equivalent.

In the Senate proceedings there arose some controversy over the requisite evidence for establishing a violation under this new standard. Most notably there was disagreement over the significance of the stipulation that a disproportionate result, "in and of itself" would not constitute a violation of this section. Logically, it was argued that

according to this language a disproportionate result and one additional iota of evidence of discrimination would suffice for the establishment of a Section 2 violation.

Proponents of the House-passed test claimed that this simple reading of the "results" test was not indicative of the intended standard of adjudication. Rather, they argued that under a "results" test the Court would be directed to a sensitive inquiry into the "totality of the circumstances" of each individual case. They further stipulated that the courts would be guided by the reasoning of the Supreme Court in *White* v. *Regester*, 412 U.S. 775 (1973), a 14th Amendment Equal Protection Clause case. There is no doubt that the amendment to Section 2 was designed to overturn the Supreme Court's interpretation of the 15th Amendment in *Mobile* v. *Bolden* 446 U.S. 55 (1980). Proponents of the amendment claimed that this action would restore the original standard, the "results" test as articulated in *White* to voting discrimination cases.

WORKING ASSUMPTIONS

As it became evident that there was to be a change in Section 2 many of us focused our attention on the problem of distinguishing between a "disproportionate" result and a "discriminatory" result. I for one was uncomfortable with the language in the House-passed bill. I was sympathetic to the desires of our colleagues in the House to ensure that the prohibitions of Section 2 were enforcable. I did not feel however, that the proposal which the House approved was an adequate guarantee against an ultimate mandate of proportional representation. Therefore, I expressed my reservations with that proposal at the Subcommittee mark-up. I also indicated that I was not satisfied with the pragmatic implications of the "intent" test and declared my intentions of seeking some form of compromise.

In working on this proposal, I acted on the basic assumption that selected minority groups should not be subjected to invidious exclusion from effective political participation; neither should they be entitled to constitutional protection from defeat at the polls. This premise is simply a functional restatement of the differentiation between a "discriminatory" result and a "disproportionate" result. I was confident that some mechanism could be devised by which this distinction could be made in an equitable and certain manner. I believe that the compromise proposal which I co-sponsored and which has been approved by the Committee achieves this goal.

ANALYSIS ON SECTION 2

Briefly, the amendment substitutes a "results" test for the "intent" standard in the original Section 2. A new subsection (b) is created which includes specific modifying language taken directly from the Supreme Court's *White v. Regester* decision. Thus, the Committee has created a new standard that codifies the analytical interpretation of voting discrimination as articulated in *White v. Regester*. Thus the new language of Section 2 is the test utilized by the Supreme Court in *White*, nothing more and nothing less.

By substituting a "results" test in Subsection (a) the proposal clarifies that proof of discriminatory purpose is no longer required

for the establishment of a Section 2 violation. Should plaintiffs choose to satisfy the "intent" standard they may do so. The new standard demands that plaintiffs show that, in accordance with the provisions of Subsection (b), the challenged practice or procedure was imposed or applied in a manner which results in a denial or abridgement of the right to vote on account of race or color. The establishment of a violation—proving a discriminatory result—is thus contingent upon satisfaction of the provisions of Subsection (b).

Subsection (b) directs the courts to consider the "totality of the circumstances" in adjudicating each individual case. In evaluating these cases the Court should conduct a thorough inquiry into the relevant circumstances and objective factors of each case. Later in this section it is stipulated that "disproportional representation" is only one "circumstance" which may be considered. Other objective factors which the Court may find relevant are adequately outlined in the Committee Report.

It is further stipulated in Subsection (b) that a violation is established if, based on the Court's inquiry into the totality of the circumstances, it is shown that "*the political processes* leading to nomination or election in the state or political subdivision *are not equally open to participation by members* of a class of citizens protected by Subsection (a). "Not equally open" is thereafter defined by the clause "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Therefore, in order to establish a violation by proof of a discriminatory result plaintiffs must demonstrate that the members of the minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

WHAT IS THE NEW STANDARD?

In determining the practical significance of these rather nebulous concepts the Committee has ordered that the Courts rely upon the Supreme Court's application of this standard in *White* v. *Regester*. In that case the Court found that there existed functional bars to participation by both Black and Mexican-American citizens in the political processes in Dallas and Bexar Counties. The Court found that Blacks in Dallas County were effectively barred from slating candidates in the Democratic party. In Bexar County the Court noted that Mexican-Americans suffered a cultural and language barrier that made participation in community processes extremely difficult. *White* p. 768.

The committee has sought to overcome these semantical difficulties by embracing a practical standard articulated in the Supreme Court decision of *White* v. *Regester*. The plain language of subsection (b) and the Supreme Court's analysis of the totality of the circumstances in *White* lead me to the conclusion that the exclusive test in voting discrimination cases is whether there exists an effective bar to minority citizens' equal opportunity to participate in the political process. In the absence of such a bar a violation of Section 2 of the Voting Rights Act could not be established.

PROPORTIONAL REPRESENTATION

Finally, the amendment reads "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." At several instances the Committee Report states "that the Section creates no right to proportional representation for any group". The Committee Report also states that any concerns that have been voiced about racial quotas are put to rest by the basic principle of equity that the remedy must be compensurate with the right that has been violated. Committee Report Section VI pg. 9.

Therefore, as there is no right to proportional representation, the courts are prohibited from imposing proportional representation as a remedy. In fact, the Subcommittee minority reached the same conclusion; "the minority joins the majority in rejecting proportional representation as either an appropriate standard for complying with the Act or as a proper method of remedying adjudicated violations." Subcommittee Report p. 83.

CONCLUSION

In conclusion, I am wholly satisfied with the bill as reported by the Committee and I concur with the interpretation of this action in the Committee Report. I believe that the measure approved by this Committee is as certain and equitable as possible. The new *White* v. *Regester* Section 2 standard is a practical, effective, and fair mechanism for eliminating all subtle and complex forms of invidious discrimination in voting.

ADDITIONAL VIEWS OF SENATOR JEREMIAH DENTON ON S. 1992

The Voting Rights Act of 1965 has proven to be a successful means of ensuring the full participation of all citizens in the election process. Moreover, I am pleased with the advances that the South, in particular, has made with respect to minority voter registration and participation since the passage of the Act. It is evident that still more progress is possible and that a reasonable extension of the preclearance provisions of the Voting Rights Act is worthy of Senate consideration. Therefore, I favored passage of the bill out of the Committee on the Judiciary and may support the Act when it is presented in final form to the Senate.

However, during full Committee consideration of the Voting Rights Act, I and others unsuccessfully opposed amendments to the original Act which unacceptably altered the standard of proof in Section 2 and instituted a so-called "bail-out" provision which would effectively prohibit most compliant jurisdictions from successfully removing themselves from coverage under Sections 4 and 5 of the Act. Accordingly, I will support a number of amendments designed to rectify those provisions when the bill is considered on the floor of the Senate.

I concur with the views expressed by Senator East and Senator Hatch and would hope that members of the Senate examine those views carefully before accepting the changes that the Committee has made in the original Voting Rights Act.

MINORITY VIEWS OF SENATOR JOHN P. EAST

Fundamental—indeed radical—changes in the way our democracy works will surely come about if Congress passes S. 1992. This measure would not only extend the extraordinary requirements of the Voting Rights Act of 1965, but would also place new, severe, and unconstitutional restraints on local governments throughout the country. Before the Senate acts on this bill members should take adequate time to consider both the need to extend the Act and the wisdom of new changes in the Act that place unparallelled power to alter the character of local and state government in the hands of the Federal Government.

I. The Genesis and History of the Voting Rights Act of 1965

Congress has given too little consideration to the constitutional basis of the Voting Rights Act of 1965. Much of the current discussion has evidenced a confusion as to whether it is the fourteenth or the fifteenth amendment that gives Congress the authority to pass such a law. Although the Equal Protection Clause frequently has been utilized to protect the right to vote, the fifteenth amendment, declaring that the right to vote shall not be denied or abridged "on account of race, color, or previous condition of servitude," was originally intended to serve as the real workhorse of Negro suffrage.[1] Two months after the amendment was adopted, Congress, exercising its new enforcement powers under section 2 of the Fifteenth Amendment,[2] passed the Enforcement Act of 1870.[3] But this measure, which sought to prohibit both state and private action interfering with voting rights, was largely unsuccessful. The Supreme Court struck down provisions of the Act aimed at private action,[4] and Congress in 1894 repealed most of the remaining sections of the statute dealing with official action.[5]

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[1] That the framers of the Fourteenth amendment never intended to protect political rights and Negro suffrage under the equal protection clause is convincingly argued by R. Berger, "Government by Judiciary," 52–192 (1977).

[2] The Thirteenth, Fourteenth and Fifteenth amendments contain almost identically worded sections empowering Congress to enforce them. Section 2 of both the Thirteenth and Fifteenth amendments provides that "Congress shall have power to enforce this article by appropriate legislation." Section 5 of the Fourteenth amendment, however, states that "The Congress shall have power to enforce by appropriate legislation, the provisions of this Article." The Court has discerned no difference among the clauses and none was intended. *See City of Rome* v. *United States*, 446 U.S. at 207–08 n. 1 (1980). Rehnquist, J., dissenting); *United States* v. *Guest*, 383 U.S. 745, 783–84 (1966) (Brennan, J., concurring in part, dissenting in part); *James* v. *Bowman*, 190 U.S. 127 (1903). Enforcement clauses have been routinely added to constitutional amendments since the adoption of the Reconstruction Amendments. *See* U.S. Const. amends. XVIII, sec. 2, XIX, para. 2, XXIII, sec. 2, XXIV, sec. 2, XXVII, sec. 2 (proposed).

[3] Ch. 114, 16 Stat. 140 (1870). As originally introduced by Representative John Bingham of Ohio (author of section 1 of the Fourteenth amendment), the Act covered only state action under the Fifteenth amendment. Under the sponsorship of Senator John Pool, a Republican from North Carolina, however, the Act was broadened to cover private action and action interfering with rights under both the Fourteenth and Fifteenth amendments. *See also* the Force Act of 1871, ch. 99, 16 Stat. 433.

[4] *James* v. *Bowman*, 190 U.S. 127 (1903). The Court struck down section 5 of the Act on the ground that the Fifteenth amendment did not authorize Congress to prohibit private interference with the right to vote.

[5] Ch. 25, 28 Stat. 36 (1894); ch. 15, 35 Stat. 1153 (1909). The surviving statutes of this period are 18 U.S.C. secs. 241–242 (1976) (criminal) and 42 U.S.C. secs. 1971(a), 1983, 1985(3) (1976) (civil). The debates on the enactment and repeal of the Act are collected in I B. Schwartz, "Statutory History of the United States: Civil Rights," 443–543, 803–34 (1970).

Congress then withdrew from the field, and for the next sixty years the task of eliminating racial qualifications in the franchise devolved principally on the Supreme Court. In carrying out this responsibility, the Court assiduously thwarted state efforts, whether statutory or administrative, to disenfranchise blacks, even reaching out to strike down attempts by political organizations to exclude blacks from voting in primary elections.[6] Throughout this period, the Court's discussion of Congress' enforcement powers under the fifteenth amendment was necessarily limited to the issue of whether Congress could proscribe private action. The only remedial legislation passed by Congress was the Force Act of 1871, designed to supplement the Enforcement Act of 1870 by providing for the appointment of federal officers to supervise elections of members of the House of Representatives.[7] In *Ex Parte Siebold*[8] the Supreme Court upheld the Force Act as a proper exercise of Congress' powers under article I, section 4 (the "Times, Places and Manners Clause"), without reaching the question of Congress' enforcement powers under the fifteenth amendment. In 1894, however, this measure was repealed.

The general theory thus adopted concerning Congress' power over the electoral process indicated that Congress could legislate under the fifteenth amendment to protect the suffrage in all elections against state interference based on race, color, or previous condition of servitude,[9] whereas under article I, section 4, Congress could legislate against public or private interference but only in federal elections. Protection against private interference with the right to vote in state elections was therefore thought to be beyond the scope of Congress' powers.

Here matters stood when Congress reasserted its enforcement powers in response ot the civil rights movement that erupted in the wake of *Brown* v. *Board of Education*.[10] The first in a series of remedial statutes designed to assist in federal enforcement of fifteenth amendment rights, the Civil Rights Act of 1957[11] made it unlawful for any person, whether acting as a public official or privately, to interfere with the right to vote in any election for federal officers. At the heart of the Act's enforcement mechanism were provisions authorizing the Attorney General to institute civil suits for injunctions in aid of the right to vote in state, territorial, district, municipal, or other territorial subdivision elections, and to seek injunctive relief in the courts against violations of civil rights protected under section 2 of the Ku Klux Klan Act of 1871.[12]

This Act was followed by the Civil Rights Act of 1960, which again increased the powers of the executive branch and strengthened existing procedures by authorizing the Attorney General to obtain a finding, through the courts, of a "pattern or practice" of voter discrimination in any jurisdiction. Upon the entering of such finding, which sig-

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[6] *See Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).
[7] Ch. 99, 16 Stat. 433 (1871). In effect, the Act suppressed state electoral processes.
[8] 100 U.S. 371 (1880).
[9] *James* v. *Bowman*, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1876).
[10] 347 U.S. 483 (1954).
[11] Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified in scattered sections of 5, 28 and 42 U.S.C. (1976)).
[12] 42 U.S.C. secs. 1971(b), (c) (1964). Section 2 of the Klan Act is now 42 U.S.C. 1985 (1976). In addition, the 1957 Act established a "temporary" United States Commission on Civil Rights (subsequently extended on numerous occasions to 1981) to investigate civil rights violations and make recommendations to the President and Congress, and provided for an additional Assistant Attorney General to direct a new Civil Rights Division in the Department of Justice.

nificantly removed the issue of Negro voting beyond a case-by-case determination, all qualified blacks would be registered to vote by court-appointed referees.[13]

Title I of the Civil Rights Act of 1964 [14] signaled a new direction in voting rights legislation by restricting the rights of the several states in their determination of voter qualifications. Unlike the earlier statutes, which forbade the discriminatory application of State voter qualification standards, the 1964 Act went beyond the realm of regulation to impose nationwide standards for literacy, the equivalent of a federal literacy test. The Act not only prohibited the discriminatory administration of literacy tests in federal elections, but also established a "rebuttable presumption" of literacy for any prospective voter who had completed the sixth grade in a school where the English language had served as the basis of instruction.[15]

Finally, in the Voting Rights Act of 1965,[16] Congress exceeded what had previously been regarded as the limit of its authority under the Enforcement Clause of the fifteenth amendment. Grounded in part on section 2 of the fourteenth amendment and article I, section 4 of the Constitution, the Voting Rights Act prohibited not only various forms of State action in the electoral process, but also private acts of voter intimidation in Federal, State and local elections.[17] Creating what are admittedly "stringent new remedies for voter discrimination," [18] the Act established Federal supervision over State voter qualification tests and State electoral processes "which in the thoroughness of its control is reminiscent of the Reconstruction era." [19] While strengthening judicial remedies, the Act also provided for direct intervention through a variety of complex administrative remedies to remove both immediate and future impediments to minority political participation and representation. Enacted in response to demonstrations in Selma, Alabama protesting discriminatory voting registration practices, the Act was originally conceived as a temporary expedient to end almost a century of racial discrimination regarding voter qualification tests and access to the polls.[20] The bill that was submitted to Congress by Presi-

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[13] Pub. L. No. 86–449, 74 Stat. 86 (1960) (codified in scattered sections of 18, 20 & 42 U.S.C. (1976). The 1960 Act also authorized the appointment of federal voting referees and provided safeguards for the protection and inspection of federal election records.

[14] Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified in scattered sections of 5, 28 & 42 U.S.C. (1976)).

[15] 42 U.S.C. sec. 1971(a)(C)(c) (1964).

[16] Pub. L. No. 89–110, 79 Stat. 137 (1965) (codified at 42 U.S.C. secs. 1971, 1973 to 1973bb–1 (1976)).

[17] In its section-by-section analysis of the Act, the House Judiciary Committee commented, in anticipation of a constitutional challenge, that

"[t]he power of Congress to reach intimidation by private individuals in purely local elections derives from Article I, section 4, and the implied power of Congress to protect Federal elections against corrupt influences, neither of which requires a nexus with race. While Article I, section 4 and the implied power to Congress to prevent corruption in elections normally apply only to Federal elections, and section 11 applied to all elections, these powers are *plenary* within their scope, and where intimidation is concerned, it is impractical to separate its pernicious effects between Federal and purely local elections."—H.R. Rep. No. 439, 89th Cong., 1st Sess. 30–31 (1965), *as quoted* in II B. Schwartz, "Statutory History of the United States" 1502–03 (1970) (emphasis added). The Supreme Court has not ruled on the constitutionality of section 11 of the Act relating to private actions interfering with voting rights in Federal, State, and local elections.

[18] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966).

[19] C. Rice, *The Voting Rights Act of 1965: Some Dissenting Observations*, 15 Kan. L. Rev. 159, 163 (1966).

[20] The historical setting of the Act is discussed in II "Congressional Quarterly Service: Congress and the Nation" 1965–1968 354–64 (1969); *see also South Carolina* v. *Katzenbach*, 383 U.S. at 308–15 (1966) (discussing Congressional and judicial concern over tactics regularly employed in the South to evade the Fifteenth amendment and prevent Negroes from voting). For a discussion of earlier Federal effects to enforce Negro voting rights, see Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973); Note, *Federal Protection of Negro Voting Rights*, 51 Va. L. Rev. 1053 (1965).

dent Lyndon Johnson on March 17, 1965 provided that the Act should remain in effect for ten years.[21] Congress rejected this proposal in favor of a five-year period; but in 1970 Congress extended coverage of the Act for another five years and in 1975 extended it again for seven.[22] With two important exceptions, most provisions of the Voting Rights Act are scheduled to "expire" in 1982.[23]

II. Covered Jurisdiction and the Preclearance Requirement

The most far-reaching portion of the Voting Rights Act of 1965 is that contained in sections 4 and 5. This section gives the executive branch the authority to set up the extensive system of regulation which has provided so many cries for a reasonable bailout.

A. COVERED JURISDICTIONS

Sections 4(a) and 4(b) establish an automatic formula or "triggering" mechanism whereby a State (or one of its local units of government from applying any "test or device" [24] as a qualification for voting in any election if the State or local unit maintained any test or device on November 1, 1964 and if less than 50 percent of its voting age population was registered to vote or actually voted in the 1964 presidential election. Amendments to the Act have extended the coverage formula of section 4 to include jurisdictions that maintained a test or device on November 1, 1968 or 1972, and had less than a 50 percent turnout in the 1968 or 1972 presidential elections.[25] Direct judicial review of the findings by the Attorney General which trigger the suspension of tests is barred.[26]

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[21] Significant portions of the legislative history of the original act are contained in H.R. Rep. No. 439, 89th Cong., 1st Sess. 72 (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 2437–508 and II B. Schwartz, supra note 27, at 1484; S. Rep. No. 162, 89th Cong., 1st Sess. (1965); *Joint Views of 12 Members of the Judiciary Committee Relating to the Voting Rights Act of 1965, attached to* S. Rep. No. 162, *supra*, and *reprinted in* [1965] U.S. Code Cong. & Ad. News 2540. President Johnson's March 15 address on voting rights to a joint session of Congress one week after the Selma disturbance, and floor debate on the Act, are contained in II B. Schwartz, *supra* note 27, at 1506.

[22] Congressional action on the most recent extension of the Act in 1975 is contained in *Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 House Hearings]; *Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*]; S. REP. No. 94–295, 94th Cong., 1st Sess. (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 774.

[23] Technically speaking, a covered state would not be automatically exempt under section 4 even if Congress failed to extend the Act August 6, 1982, as it would still be necessary for the state to bring an action for declaratory judgment. *See* 42 U.S.C. sec. 1973 b(a) (1976). 42 U.S.C. sec. 1971 (1976), in which subpart (a)(2)(c) prohibits the use of a literacy test as a condition for voting, is permanent legislation. The bilingual ballot requirements in 42 U.S.C. secs. 1973aa–1a are not scheduled for expiration until August 6, 1985. Senator S. I. Hayakawa and Representative Paul McCloskey, California Republicans, have introduced legislation calling for repeal of the bilingual requirements.

[24] Section 4(c) of the Act defines a "test or device" as any requirement that a person, as a prerequisite for registration or voting, demonstrate literacy, educational achievement, knowledge, or good moral character, or produce registered voters or other persons to vouch for his qualifications. 42 U.S.C. sec. 1973b(c) (1976). *See also* 42 U.S.C. sec. 1973b(f)(3) (1976).

[25] 42 U.S.C. sec. 1973b(b) (1976).

[26] Id. Under sec. 4(b) of the Act. "[t]he provisions of subsection (a) shall apply in any state or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

"A determination or certification of the Attorney General or of the Director of Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

Jurisdictions covered in 1965 and early 1966 included Alabama, Alaska, Georgia, Louisiana, Mississipi, South Carolina, Virginia, 28 of the 100 counties in North Carolina, 4 of the 14 counties in Arizona, Honolulu County, Hawaii, and Elmore County, Idaho. Since 1965, other jurisdictions have been added and coverage extends also to Texas, certain counties in California, Colorado, Florida, Michigan, New York, South Dakota, and Wyoming, and a number of towns in the New England states of Massachusetts and New Hampshire.[27] Under section 4(a) of the Act, however, a covered jurisdiction may "bail out" and exempt itself if it can persuade the District Court for the District of Columbia that the jurisdiction has not used a test or device in a discriminatory manner for seventeen (originally five) years preceding the filing of an action for a declaratory judgment.[28] Since 1965, only one state has succeeded in bailing out. In 1966, and again in 1971, Alaska gained exemption, but the 1975 extension of the Act re-established coverage.[29] One other state, Virginia, attempted without success to bailout in 1973.[30]

B. SECTION 5: THE "PRECLEARANCE" REQUIREMENT

Once a state or one of its political subdivisions has been subjected to the strictures of section 4 and is prohibited from applying a voter qualification test, it may not thereafter make any changes in its electoral laws unless the executive or judicial branches of the federal government agree beforehand that such changes are nondiscriminatory. Section 5 of the Act stipulates that no state or local government may even enact a new law "or seek to administer any voting qualification or prerequisite to voting [that is] different from that in force or effect on November 1, 1964," without first gaining the approval of the Attorney General or the United States District Court in the District of Columbia.[31] The announced purpose of the section 5 preclearance provision "was to break the cycle of substitution of new discriminatory laws and procedures when old ones were struck down."[32] The more immediate objective of this provision is to give government lawyers in the Voting Sections of the Civil Rights Division of the Justice Department direct and continuous administrative supervision over the affected states and their political entities, and to avoid the inconvenience of the judicial process. The provision's obvious effect is to give the federal government a veto over all new electoral laws enacted by the covered jurisdictions, whose pre-existing voter qualification standards have been frozen under section 4 of the Act.

Until 1971, section 5 was rarely employed to challenge state electoral changes, owing in part to the Justice Department's preoccupation with review of existing statutes and uncertainty as to the scope

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[27] 45 Fed. Reg. 18898 (1980). For a listing of the various jurisdiction covered from 1965–1975, *see* "United States Commission on Civil Rights, the Voting Rights Act: Ten Years After" 35 (1975) at 13–16 [hereinafter cited as "Voting Rights Act: Ten Years After"].

[28] 42 U.S.C. sec. 1973b(a) (1976).

[29] Alaska subsequently filed yet another bailout suit but abandoned it. *See Alaska* v. *United States*, No. 78–0484 (D.C. Cir. May 10, 1979) (stipulated dismissal of the action).

[30] *Virginia* v. *United States*, 386 F. Supp. 1319 (D.D.C. 1974), aff'd mem., 420 U.S. 901 (1975).

[31] 42 U.S.C. secs. 1973c (1976). Amendments to the Act have extended this restriction to include laws that were in effect in 1968 and 1972.

[32] "Voting Rights Act: Ten Years After," *supra* note 27 at 25.

of section 5's coverage.[33] No less uncertain at the time was the scope of the Attorney General's authority under section 5. Seemingly a delegation of unfettered discretion regarding procedures, standards and administration, section 5 is silent with respect to the procedures the Attorney General must follow in deciding whether to challenge a state submission for an electoral change, what standards govern the contents of these submissions, and what is meant by the sixty-day provision of section 5 in which the Attorney General is to respond to requests for his approval of electoral changes.[34] Moreover, section 5 does not even authorize the Attorney General to promulgate any regulations. Such regulations were nevertheless issued in 1971, surviving constitutional attack in *Georgia* v. *United States*.[35] "If these regulations are reasonable and do not conflict with the Voting Rights Act itself," declared Justice Stewart for the Court, "then 5 U.S.C. section 301, which gives to '[t]he head of an Executive Department' the power to 'prescribe regulation for government of his department' . . . is surely ample legislative authority for the regulations."[36] Reversing the burden of proof, which would ordinarily be carried by the federal government, the Act and accompanying regulations require the submitting jurisdiction to demonstrate to the satisfaction of a three-judge District Court in Washington or the Attorney General that its proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[37] The regulations candidly acknowledge that "section 5 . . . imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia."[38] Should a state or one of its political subdivisions fail to submit a formal request for a change of its electoral laws, both the Attorney General and private parties[39] may bring suit to enjoin enforcement of the law. Following a request for preclearance, the Attorney General has sixty days in which to interpose an objection or allow the change to stand; and the voting practices submitted become fully enforceable if the Attorney General fails to make a timely objection.

The vagueness of this provision, inviting arbitrary discretion, has produced considerable confusion and controversy. Although the Act

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[33] Id. at 25, n. 53; MacCoon, "The Enforcement of the Preclearance Requirements of Section 5 of the Voting Rights Act of 1965", 29 Cath. U.L. Rev. 107 (1979); *see also Perkins* v. *Matthews*, 400 U.S. 379, 393 n. 11 (1971).

[34] Section 5 of the Act provides that a newly enacted electoral change may be enforced if it is submitted to the Attorney General and he does not interpose an objection "within sixty days after such submission, or upon good cause shown . . . [n]either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement of such qualification." 42 U.S.C. sec. 1973c (1976). Does any objection suffice? May the Attorney General simply object to all section 5 submissions? *See Georgia* v. *United States*, 411 U.S. 526, 542–43 (1973) (White, J., dissenting).

[35] 411 U.S. at 536.

[36] Id. The Court cited *United States* v *Morehead*, 243 U.S. 607 (1916) and *Smith* v. *United States*, 170 U.S. 372 (1897) as authority for this proposition. The regulations are contained in 28 C.F.R. pt. 51, secs. 51.1–51.29 (1971); *see also* D. Hunter, "Federal Review of Voting Changes: How to use Section 5 of the Voting Rights Act" (2d ed. 1975).

[37] 42 U.S.C. sec. 1973c (1976). As of 1975, the alternative of seeing a declaratory judgment without review by the Attorney General had been used only once. "Voting Rights Act: Ten Years After," *supra* note 27, at 29.

[38] 28 C.F.R. sec. 51.19 (1971).

[39] *See Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1966).

states that a new State law may be enforced if "the Attorney General has not interposed an objection within 60 days after such submission," [40] i.e., of a jurisdiction's filing, the regulations promulgated by the Attorney General provide that no submission is complete until the Attorney General has received all of the information that he deemed essential in making a decision.[41] The Act is silent as to the effect of the sixty-day rule upon requests for reconsideration of an adverse ruling by the Attorney General, but regulations specify that these requests shall also be decided within sixty days of their receipt.[42] Neither the Act nor the regulations explain the application of the sixty-day rule to supplements to requests for reconsideration. In *City of Rome* v. *United States*, however, the Court upheld the Attorney General's interpretation of his regulations on this question and ruled that the sixty-day period commences anew when the submitting jurisdiction supplies additional information on its own accord.[43] "In recognition of the Attorney General's key role in the formulation of the Act," said Justice Brennan in *United States* v. *Sheffield Board of Commissioners*, "this Court . . . has given great deference to his interpretations of it." [44]

It the Attorney General fails to make an objection, the state may enforce the change; but there is no certainty that the law will remain in effect, for section 5 of the Act contains this qualifier: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment . . . shall bar a subsequent action to enjoin enforcement of such . . . practice or procedure." [45] Continuous administrative supervision over the states and their local units of government is thus expected under the Act, even if the courts break the cycle and rule against the Attorney General. The broad scope and massive burden of this entire operation is reflected in the statistics compiled in the Justice Department. The 1975 Senate Hearings on the extension on the Act revealed that in the period between 1965 and 1974, the Attorney General's staff processed more than 1,000 requests for voting changes each year.[46] In 1979, a Justice Department official estimated that the Department's staff of eleven section 5 analysts was processing from fifty to seventy-five submissions per week—more than double the number just five years earlier.[47]

These figures reflect a more than startling increase in section 5 litigation.[48] More fundamentally, the figures reveal the radical trans-

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[40] 42 U.S.C. sec. 1973c (1976) (emphasis added).
[41] 28 C.F.R. secs. 51.3, 51.10(a), 51.18 (1971).
[42] 28 C.F.R. sec. 51.3(d) (1971).
[43] 446 U.S. at 171.
[44] *United States* v. *Sheffield Bd. of Comm.*, 435 U.S. 110, 131 (1978).
[45] 42 U.S.C. sec. 1973c (1976).
[46] *1975 Senate Hearings*, *supra* note 32, at 597; *see also*, *United States* v. *Sheffield Bd. of Comm.*, 435 U.S. at 147 (Stevens, J., dissenting).
[47] MacCoon, *supra* note 56, at 113 n.45. In addition, the Voting Rights Section of the Civil Rights Division maintains a mailing list of interested parties who receive a weekly listing of current section 5 submissions. The procedure is designed to allow private parties to monitor state and local governmental units for compliance and to assist the Justice Department in enforcement of the Act. *Id.* at 109 n.11. Also strengthening enforcement and encouraging litigation is the 1975 amendment to the Act which permits a court, at its discretion, to award attorney's fee to prevailing parties in voting rights cases. 42 U.S.C. sec. 1973(e) (1976). *See Torres* v. *Sachs*, 538 F.2d 10 (2d Cir. 1976).
[48] In the period between 1965 and 1977, 6,400 electoral requests were submitted. Approximately 5,800 of these were made from 1971 to 1974. *1975 Senate Hearings*, *supra* note 32, at 597. *See United States* v. *Sheffield Bd. of Comm.*, 435 U.S. at 147 n. 8 (1978) (Stevens, J., dissenting).

formation of the Voting Rights Act that has taken place since 1970.[49] When Justice Department officials, led by Attorney General Nicholas Katzenbach, appeared before Congress in 1965 to explain and defend President Johnson's proposed bill to eliminate discriminatory voting practices, they emphasized the limited scope of the Act. Its purpose, the officials uniformly agreed, was simply to remove the barriers to Negro voters registration. Those barriers, in fact, were the very basis of the Selma demonstrations which prompted the Johnson Administration to draft the bill. Appearing before a subcommittee of the House Judiciary Committee, Assistant Attorney General Burke Marshall, in response to a question by a member of the Committee, flatly stated that, "[t]he problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill.[50] Before that same body, Attorney General Katzenbach repeatedly emphasized that 't'he whole bill really is aimed at getting people registered." "Our concern today," he said, "is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote." [51] Ten years later, testifying as a private citizen before a Senate subcommittee in support of the 1975 extension of the Act, Katzenbach reiterated his understanding of the original intent of the legislation:

> The Voting Rights Act was originally designed to eliminate two of the principal means of frustrating the 15th Amendment rights guaranteed to all citizens: the use of onerous, vague, and unfair tests and devices enacted for the purpose of disfranchising blacks; and the discriminatory administration of these and other kinds of registration devices. The Voting Rights Act attempted to eliminate these racial barriers, first by suspending all tests and devices in the covered States, and second, by providing for voter registration in those States by Federal officials where necessary to insure the fair administration of the registration system.[52]

That the Justice Department's understanding of the purpose of the legislation was shared by Members of Congress who participated in the formation of the Voting Rights Act is abundantly evident from a careful reading of Congressional debates and committee hearings and reports. As Joseph Tydings (D-Md.), a member of the Senate Judiciary Committee stated while leading debate on the Senate floor, the provisions for the suspension of literacy tests and the appointment of federal examiners were "the heart of the bill." [53]

The success of the Act in terms of registration was almost instantaneous, and by 1972 more than one million new black voters were

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[49] *See* Thernstrom, "The Odd Evolution of the Voting Rights Act," 55 Pub. Interest 49 (1979).

[50] *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 89th Cong., 1st Sess., sec. 2, at 74 (1965) [hereinafter cited as *1965 House Hearings*]. *See also Allen* v. *State Bd. of Elections*, 393 U.S. at 564 (1969).

[51] 1965 House Hearings, supra note 50, at 21. When asked "[h]ow far down the political scale" the term "political subdivisions" went, Katzenbach replied: "I believe that the term 'political subdivision' used in this bill is intended to cover the registration area and that the whole bill really aimed at getting people registered." *Id.*

[52] 1975 Senate Hearings, supra note 22, at 121.

[53] II B. Schwartz, supra note 17, at 1526.

registered in the seven southern states covered by the Act." [54] Throughout the South blacks have registered and voted at rates comparable to whites. In the 1980 Presidential election, for example, the rate of black voter registration in the South was estimated to be 59.3 percent as compared to 66.2 percent for white voter registration.[55] The House Committee on the judiciary found that [t]oday, in many of the states covered by the Act, more than half the eligible black citizens of voting age are registered, and in some states the number is even higher. Likewise, in Texas, registration among Hispanics has increased by two-thirds.[56] As government statistics clearly show the problem of black voter registration, particularly in the South, is ancient history.[57] The original and only purpose of the 1965 has long been settled.[58]

c.

1. The Need for a Reasonable Bailout

If the goal of voter access to the polls and voter registration has been achieved, what is the reason for extending the Act? Why should those states that complied with the law since 1965 not be given an opportunity to regain full and equal rights with other states in the Union that have never been subjected to the Act? For at least two reasons broader opportunity should exist for political jurisdictions that have followed the letter and spirit of the law to terminate their coverage under the special preclearance provisions of the Act and to regain their equal and sovereign status within the Federal system.

In the first place creation of a realistic bailout would advance the civil rights of minority citizens. A reasonable bailout with stringent yet achievable requirements would give political subdivisions the incentive both to continue and to strengthen their compliance with the law. Because preclearance is so onerous and expensive, jurisdictions given a genuine opportunity to escape would make painstaking effort to protect voting rights. To ensure that they did not slacken in their diligence after the bailed out, all that would be necessary would be the inclusion of an adequate probationary period. By contrast, a refusal to offer such a bailout will perpetuate the present state of affairs in which the major impetus to enforce the law comes not from the jurisdiction itself but from the government and private citizens. To deny any realistic chance for bailout is to rely entirely on these negative enforcement practices in achieving the goals of the Voting Rights Act.

Secondly it was only because unique and extraordinary factors were present that the Supreme Court in *South Carolina* v. *Katzenbach* [59] held the original Voting Rights Act constitutional. Such a departure from the historical tenets of federalism, according to the Court, was warranted in that it was both "temporary" [60] and based on "exceptional conditions [that] can justify legislative measures not otherwise appro-

[54] The Voting Rights Act: Ten Years After, supra note 27 at 41. Between 1964 and 1972, the number of new black registrants actually increased by 1,148,621, an increase from 29 percent to over 56 percent of the blacks of voting age. *Id.* at 43.
[55] 1981 Report of the U.S. Commission on Civil Rights.
[56] H.R. Rep. No. 97–227, 97th Cong., 1st Sess. 7.
[57] 1981 Report *supra*.
[58] H.R. Rep. No. 97–227, *supra*, at 7.
[59] 383 U.S. 301 (1966).
[60] 383 U.S. at 333.

priate." [61] The Court upheld the preclearance provisions themselves "under the compulsion of . . . unique circumstances" [62] which Congress in its investigation had found to exist in the covered jurisdictions.[63] Congress, held the court, could justify coverage formula of the Act because a rational relationship existed between the coverage formula and the "evil" to which the act was addressed: discrimination in voter registration.[64]

These factors have now disappeared and little justification therefore exists for continuing to impose the stringent preclearance requirements on covered jurisdictions without offering some means of escape. The census bureau reports that the 1980 registration rate for black voters in Mississippi was 72.2% while the national average was 60.0%; and that for Massachusetts it was only 43.6%.[65] To subject some states to the onerous preclearance requirements while other states with worse records remain exempt violates not only the constitution but also common sense principles of fairness. Not only, have registration rates in covered jurisdictions improved dramatically, the other "evil" at which the preclearance provisions were aimed, the literacy test, has disappeared altogether: permanent provisions of the Voting Rights Act ban literacy tests nationwide and the original covered jurisdictions have not used such tests for years.

The figures amply demonstrate, as we have noted,[66] that bailout under the present law is a fraud and an illusion. Significantly, during the general debate over H.R. 3112 on the floor of the House, Judiciary Committee Chairman Peter Rodino admitted that "escape is virtually impossible under current law," [67] and observed that from the House hearings, "it became clear that fairness dictate[s] that an avenue to escape the preclearance requirement should be afforded those jurisdictions which have had a history of complying with the law." [68]

2. The Genesis of the Proposed New Bailout

Proponents of the new Voting Rights bill contend that the bailout language it contains offers a realistic means by which covered jurisdictions can earn their freedom from administrative preclearance. In reality the new test is as difficult, and perhaps more difficult, than the old. Under the old test all a jurisdiction has to do after the expiration of the statutory period is show that it had not used a proscribed test or device for that period of time. As a result, absent congressional action, most jurisdictions originally covered in 1965 would have had their first real opportunity this year to petition for release from section 5 coverage. As the history of the proposed new bailout shows, however, the Civil Rights Industry has made a concerted effort to ensure that no realistic bailout becomes available. Intimidated by political pressures, members on the House side failed to provide the kind of reasonable but stringent bailout that is necessary. Testifying

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[61] *Id.* at 361.
[62] *Id.* at 334.
[63] *Id.* at 335.
[64] 383 U.S. at 330.
[65] Subcommittee on Constitution to Senate Comm. on the Judiciary, 97th Cong., 2d Sess., Report on the Voting Rights Act 61 (Comm. Print 1982) [hereinafter Senate Subcommittee Print].
[66] See pp.
[67] Hon. Peter W. Rodino, Jr., *Congressional Record*, October 2, 1981, at H6842.
[68] Senate Hearings. Statement of Hon. Henry J. Hyde, a Member of Congress from the State of Illinois, January 28, 1982, hereinafter 1982 Senate Hearings.

before the Senate Subcommittee on the Constitution, Representative Henry Hyde of the House Judiciary Committee and Ranking Member of the Constitution Subcommittee explained what happened.[69] According to Representative Hyde the House experienced difficulty in getting witnesses to testify on the act:

> I found a reluctance, sadly, among people who ought to come forward to oppose some of these notions, a reluctance to testify. We were not inundated by requests from attorneys general and others to come forward and testify on the effects test or other things.[70]

Representative Hyde, in advocating his original bailout amendment, offered a trade-off between proponents and opponents of extending the section 5 preclearance requirements. He proposed giving the proponents of extension not just an additional ten-years but a permanent extension. In return he sought to develop a workable bailout standard. Just a few hours before the full Judiciary Committee approved what became the House language and sent it to the floor, however, this bailout plan was successfully dismembered. Said Representative Hyde:

> Late in the evening of July 30, and in the early morning hours of July 31, our draft and the agreements which had been reached up to that point, were stitched together and appended to new language, some previously the subject of heated debate during the negotiations and some merely the inspiration of the moment to form a new amendment which two members of the minority were persuaded to sponsor.

Interested parties, according to Congressman Hyde, specifically designed the new language to make bailout impossible:

> In my opinion, much of what was added then was unnecessary and is designed principally to frustrate bailout and remove the incentive to change electoral practices, which I had originally sought.[71]

The Committee scurried to vote on the new amendments without adequate preparation according to Representative Hyde,

> [C]opies of the amendment were unavailable to the Committee membership for purposes of study until the moment it was being debated before them. In fact, most Committee members, including at least one of the sponsors, were unaware of its content when we arrived at work on the morning of the 31st.[72]

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[69] *Id.*

[70] *Id.* Hyde then gave an example of what he meant. His testimony of what happened follows:

Mr. Hyde . . . we had one witness, a black lawyer from Mississippi, who was going to testify not in accordance with the zeit geist, with the establishment on this and he was harassed.

Senator HATCH. Harassed by whom?

Mr. HYDE. Well, by political figures in his state. Even members of his family called him and said, "You're not going to go up there and testify against the Voting Rights Act," and this man is a very well-known black lawyer who was a very interesting witness. He did testify, but I was very disturbed by what I personally evaluate as harrassment.

[71] 1982 Senate Hearings, supra.

[72] H.R. Rep. No. 97–227, supra, at 56.

The result, he said, was no-longer a trade-off but a one-sided attempt to ensure that no jurisdiction ever escape preclearance:

> The trade-off was a decent, workable bailout, and we ended up with permanent preclearance, and a real tough, miserable, almost impossible bailout, so we got the worst of both worlds.[73]

Political pressure only intensified when H.R. 3112 reached the floor of the House. Supporters of the new bill let it be known that any questioning of or deviation from its language constituted a punishable lapse from orthodoxy, and would justify the vicious charge of racism:

> By the time it reached the floor, suggestions that alternate views should be considered were quickly met with harsh charges that any deviation whatsoever from what was pushed through the full Judiciary Committee merely reflected "code word(s) for not extending the [A]ct."
>
> This intimidating style of lobbying had the ironic effect, though clearly intended, of limiting serious debate and creating a wave of apprehension among those who might have sincerely questioned some of the bill's language.
>
> No one wishes to be the target of racist characterization, and the final vote reflected more of an overwhelming statement of support for the principle represented by the Act than it did concurrence with each and every sentence or concept it contains.[74]

b. Senate Examination of the House Bailout.—As they had done in the House, lobbyists continued to exert an enormous amount of pressure to ensure that no changes were made in their language. Senator Hatch, Chairman of the Constitution Subcommittee told Representative Hyde during Senate hearings that witnesses were again facing a great deal of harassment:

> Well, I know of some instances on this side where we've asked people to testify, where they have expressed personally to me harassment about testifying and, frankly, have not been able to testify. I've been appalled by it, to be honest with you.[75]

This pressure, he concluded, would make it difficult ever to get a reasonable bailout provision:

> Well, I haven't meant to find fault, but I concluded early in this research on this that it's going to be very difficult to ever get a reasonable bailout provision, because there is more heat than light in this matter, and there's an unwillingness on the part of many members of Congress and, I might add, certainly many other influential people in our society to really address that issue, even though it deserves it, as you're doing right now.[76]

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[73] 1982 Senate Hearings, supra.
[74] *Id.*
[75] Senate Hearings, January 28, 1982.
[76] *Id.*

Witness after witness testified about the need for a new, rational bail-out mechanism.[77] From the evidence before it the Subcommittee concluded that, under the House-approved language, few if any jurisdictions could ever bail out since the provisions of the House bill are wholly unreasonable:

> To proponents of H.R. 3112 who would argue that new bail-out provisions mitigate the permanent nature of the new preclearance obligation, the subcommittee responds that this would be the case only if the bail-out were reasonably designed to afford and opportunity for release from preclearance by those jurisdictions within which "exceptional" circumstances no longer existed. The subcommittee believes strongly that such is not the case. As discussed in more detail above, it is our view that the bail-out in H.R. 3112 is wholly unreasonable and affords merely an illusory opportunity to be released from coverage.[78]

Indeed, the Subcommittee concluded that none of the evidence justified the House bailout and that therefore none of the evidence justified continued imposition of the preclearance requirement:

> No evidence of any kind has been shared with the subcommittee that would contradict this assessment of the "reasonableness" of the House bail-out. This is a critical matter since the very constitutionality of the proposed amendments—and indeed of the preclearance provision itself—rests upon such an affirmatice finding.[79]

Put very simply, the Subcommittee found that implementation of the House bailout would be unconstitutional.

3. An Impossible Bailout

Analysis of the proposed bailout supports the finding of the Subcommittee. Armand Derfner, Director of the Voting Law Policy Project of the Joint Center for Political Studies, has compared the new bail-out to a "screen" since each jurisdiction that bails out must meet a battery of tests.[80]

Two kinds of tests will face any covered jurisdiction that petitions for release from section 5 coverage. First are the ten-year eligibility tests. Under these tests a jurisdiction must demonstrate that for 10 years prior to filing a petition for bailout, and during the pendency of that petition

> (1) it has not used a test or device with discriminatory purpose or effect [4(a)(1)(A)];
>
> (2) no Federal court has issued a final judgment determining that the jurisdiction denied or abridged voting rights [4(a)(1)(B)];

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[77] See e.g. Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith; January 28, 1982, U.S. Representative Henry Hyde; February 1, 1982; Susan McManus, Professor, University of Houston; February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia; March 1, 1982, Assistant Attorney General of the United States, William Bradford Reynolds.

[78] Sen. Subcommittee Print 62.

[79] *Id.* at 63.

[80] Senate Hearings, February 2, 1982.

(3) the jurisdiction has not entered into any consent decree, settlement, or agreement which results in abandonment of a challenged voting procedure [4(a)(1)(B)];

(4) no one, before the jurisdiction files an action seeking bailout, commences an action alleging that denials or abridgements of the right to vote have occurred anywhere in the jurisdiction [4(a)(1)(B)];

(5) neither the Attorney General nor a Court have assigned Federal examiners to a petitioning jurisdiction [4(a)(1)(C)];

(6) the petitioning jurisdiction, and all jurisdictions within it, whether subject to state control or not, have complied with all the preclearance provisions of Section 5 and have not enforced non-submitted changes [4(a)(1)(D)];

(7) The Attorney General has made no objections to a submission for preclearance except those overturned by a court [4(a)(1)(E)];

(8) no court has denied declaratory judgment under Section 5 with respect to a submission of a voting law change [4(a)(1)(E)]; and

(9) no submissions or declaratory judgment actions under Section 5 are pending [4(a)(1)(E)].

The second set of tests are criteria allegedly designed to aid a jurisdiction in demonstrating it has taken positive or constructive steps to end voting discrimination. Under these constructive-efforts tests jurisdictions must:

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

Many of these requirement guarantee that third parties or the federal government will be able to block bailout arbitrarily and at will. Simply by paying the necessary fifteen dollar filing fee in time, any person willing to bring a civil rights suit can keep a jurisdiction under preclearance for an indefinite period. Given the new, elastic standards of the Dole-Kennedy-Mathias bill, it will be most difficult for judges to dismiss summarily even the most frivolous suits. Under the bill the Attorney General and the Department of Justice will gain broad discretion to keep jurisdictions under Section 5. Particularly effective in this respect will be the "no-objection" and "no-examiner" requirements. Under the present Act the Attorney General has virtually unlimited discretion to object to a proposed voting law or to send in examiners. Using these powers his ability to bar bailout under the new language would be virtually unlimited, and would invite political manipulation. Since under the law, moreover, no appeal or review is available from a decision to send in examiners, he can not be held

accountable for abuse of this authority.[81] There is no other area of the law where the unreviewable discretion of a single appointed official can have such drastic consequences. Such broad discretion raises the distinct possibility that a future Attorney General might designate examiners and observers merely in order to prevent a covered jurisdiction from escaping preclearance.

The second set of tests, the constructive-efforts criteria, place broad discretion to bar bailout in the Federal courts. These criteria are replete with vague and untested language, language that courts will have to construe. Terminology such as "inhibit or dilute equal access," and "constructive efforts" will give Federal judges excessively broad authority to create new law requiring covered jurisdictions to implement policies and practices not specified in the statute. Employing such vague language in a statute is a notorious device used by despotic governments. When one subject to a law is uncertain about what he has to do to comply with it, he stands at the mercy of the government. Noting that the principle of rule of law requires certainty and specificity in the law, Sir Matthew Hale argued in a reply to the English philosopher Thomas Hobbes (written about 1673) that laws should be particular and certain:

> "... [T]o avoid that great uncertainty in the application of reason by particular persons to particular instances; and so to the end that men might not be under the unknown arbitrary uncertain reason of particular person, has been the prime reason, that the wiser sort of the world have in all ages agreed upon some certain laws and rules and methods of administration of common justice, and these to be as particular and certain as could be well thought of." [82]

The "constructive-efforts" criteria are not particular and certain. They do not put a jurisdiction on notice as to what it has to do to comply with the law. At best they give it only vague hints as to the direction it must travel. The criteria themselves give a jurisdiction no real guidance as to how far to go in its efforts or what roads to take. It must look to the courts for that information.

Other requirements of the new bailout do not vest broad discretion in any individual or organization. They will, nonetheless, serve equally well as blocks to bailout. Several of the ten-year eligibility tests require one hundred percent compliance with section five, a compliance that is next to impossible as a practical matter. Under these tests a jurisdiction must have precleared all changes in voting procedures before they were enforced and it must have repealed all changes to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment. Certainly, covered jurisdictions should comply with

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[81] Technically, as the majority points out, a city political subdivision "appeals" an objection by filing a *de novo* declaratory judgment action in the District Court for the District of Columbia. This right to "appeal" might mean something if Congress made a community eligible for attorneys fees under the Civil Rights Attorneys Fees Act 42 U.S.C. 1988. Testimony before the Senate Subcommittee on the Constitution, however, has amply demonstrated the prohibitive financial burden that bringing such actions places on local communities, particularly communities far distant from Washington, D.C. See

[82] "Sir Mathew Hale's Criticisms on Hobbe's Dialogue of the Common Laws" printed as appendix to W. S. Holdsworth, A History of English Law [London, 1924], V, 503), as quoted in F. Hayek, *The Constitution of Liberty*, 465, n.61 (1960).

the law. Because bailout of a greater jurisdiction is tied to that the lesser,[83] however, a minor oversight or infraction, which even the most diligent state or regional authorities might make, such as neglecting to get the approval of the Justice Department to move the office of a county registrar from one floor to another, could block an entire state under section 5 for ten more years. Significantly, David H. Hunter, an attorney with the Voting Section of the Justice Department has emphasized how impossible total compliance with the preclearance requirement is, not only because what constitutes a violation is still unclear in many cases but also because of emergencies that arise at election time:

> Complete compliance with the preclearance requirement is practically impossible in two respects.
>
> First, no matter how many changes an official submits to the Attorney General, a student of Section 5 can always find another change that has not been submitted. For example, a probate judge always submits changes in the location of polling places, but he neglects to submit the rearrangement of tables and booths at one polling place.
>
> Second, no matter how well an election administrator plans in advance of an election, there will always be changes that must be implemented before they can be precleared. For example, a polling place burns down the night before the election.[84]

Statistics supplied to the Subcommittee on the Constitution by Armand Derfner [85] show that considering only four of the ten-year eligibility factors, (no-judgment, no objection, no examiners, no non-submissions) a substantial portion of the deep South already would already be barred from bailout: 45% of all counties in Alabama, 67% of those in Georgia, 33% in Louisiana, and 76% of those in South Carolina would be thus precluded. According to Derfner, in fact, of a total of 808 counties for which the Southern Regional Council had figures, only 24% would be eligible for bailout. Since, under the new bail out language, no state could bailout as long as any political subdivision in the state remained covered by Section 5, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia, whatever state-level action they may have taken, will all be precluded from bailout. Even if all these statistics showed a large number of jurisdictions now eligible for bailout, they offer small comfort. When the smallest local violation of preclearance standards can block an entire state or when third parties, the Justice Department, and the courts also have broad discretion to intervene and prevent the bailout of any jurisdiction, it becomes clear that a jurisdiction's probability of successful bailout approaches zero.

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[83] The argument for this position is that, if a whole state has to remain under Section 5, the state authorities will put pressure on a recalcitrant subdivision. Those who agree in this fashion, assume too readily that state authorities will be able to exercise detailed control over local election processes.

[84] David H. Hunter. "Section 5 of the Voting Rights Act of 1965; Problems and Possibilities," prepared remarks for delivery at the Annual Meeting of the American Political Science Association (1980).

[85] Statement of Armand Derfner, Director, Voting Law Policy Project, Joint Center for Political Studies. February 2, 1982.

4. The New Bailout Criteria Are Unconstitutional

Difficulty of compliance, however, is not the major problem with the bailout criteria. The major problem is that the way the bailout works is unconstitutional and goes beyond the power granted Congress by the Fifteenth Amendment. To justify keeping a jurisdiction under the stringent requirements of section 5, Congress, pursuant to *South Carolina* v. *Katzenbach*, should have made at least two determinations. First, it should have shown that "exceptional conditions" and "unique circumstances" continue to exist in at least some covered jurisdictions—conditions and circumstances that "can justify legislative measures not otherwise appropriate." [86] Second, it should have demonstrated that the bailout offers rational criteria for determining whether or not extraordinary circumstances and unique conditions continue to exist in a particular jurisdiction.

a. Congress has shown neither "exceptional conditions" nor a rational relationship between application of the new bailout criteria and discovery of abuses in covered jurisdictions.—Neither the House nor the Senate has met its responsibility in either of these respects. In the hearings a few scattered charges before the House Judiciary Committee, of harassment and intimidation of minority citizens who attempted to register were made, but there was no attempt by the committee to verify these accusations or to allow for rebuttal.[87] Certainly there is no indication that such denials of the right to register pervade the entire South, a single state, or even a county. In fact, as noted earlier, registration rates are high in the South, equal to or exceeding the national average.[88] The great bulk of the testimony the House heard concerned practices that allegedly cause "dilution of voting power," practices such as at-large elections, high fees and bonding requirements, shifts from elective to appointive office, full state voting requirements, residency requirements, annexations, retrocessions, incorporations, and apportionment. No one has made any showing, a showing required by *South Carolina* v. *Katzenbach*, that these practices, which were not the object of the Voting Rights Act of 1965, were somehow unique to covered jurisdictions. Before both the House and Senate the witnesses consciously restricted their testimony to covered jurisdictions.[89] To justify Section 5 coverage of the South because of alleged vote dilution, however, these witnesses should have shown that covered jurisdictions are unique in the way they apply the questioned practices. Otherwise no justification exists for the unequal treatment afforded covered and uncovered states.

Assuming, however, for the sake of argument, that Congress did find exceptional conditions to exist in some covered jurisdictions, it still did not make a rational showing as to how the bailout criteria will help in spotting those particular jurisdictions. As shown above, the new language was drafted in haste, the result of a last-minute political bargain reached in the dead of night. Members of the House simply had no adequate data before them as to how the new standards

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[86] See the discussion of *South Carolina* v. *Katzenbach*, supra at [p. 18 of draft].
[87] See H.R. Rep. No. 97–227, supra, at 14–15.
[88] See pp. and supra.
[89] Typical is the Civil Rights Commission in whose report *The Voting Rights Act: Unfulfilled Goals* 1981, it explicity States that the Commission limited its valuation to "the current status of minority voting rights in jurisdictions covered by the special provisions of the Voting Rights Act of 1965, as amended."

would work. The only Congressional examination of the new bailout provisions was that of the Senate Subcommittee on the Constitution. It sharply criticized the proposed criteria,[90] calling them "wholly unreasonable." Neither branch of Congress has offered any explanation as to how application of the new criteria will aid the government in determining where abuses are taking place.

b. No rational justification exists for applying the new bailout criteria.—A number of the new bailout standards have little if any probative value. Falling afoul of one of these criteria by no means indicates that a jurisdiction has violated the Fifteenth Amendment. Even the standards which offer some aid in locating potential abuse do not serve the ends of justice because the statute sets them forth not as factors for a court to consider, but as absolute bars to bailout.

Among the most egregious examples in the statute of standards that have little probative value is the unaccountable prohibition against consent decrees and settlement agreements. Consent decrees do not identify the wrongdoers in a particular dispute. Parties frequently enter into such decrees voluntarily to avoid costly litigation. To discourage their use is to deprive the government of a major tool for securing prompt compliance with the Voting Rights Act. Almost certainly this new standard will have the side-effect of chilling efforts to solve voting rights disputes informally and voluntarily. Rather than have to wait another ten years to bailout, jurisdictions will have added incentive to do battle in court.

Similar problems arise from the "no-objection" requirement. Section (4)(a)(1)(E) of the Dole-Kennedy-Mathias bill requires a jurisdiction to show that "the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court)." The new bill precludes a court from considering why the Attorney General objected to a proposed change. Entry of an objection, however, standing by itself, offers no proof that actual discrimination has taken place.[91] Under Section 5 the Attorney General often interposes an objection to a voting change simply because not enough information is on hand for the affirmative showing that a proposal "does not have the purpose and will not have the effect" of discrimination in voting. It is not uncommon as well as for the Attorney General to withdraw an objection.[92] Under the new bill, even an erroneous objection to a change that is non-discriminatory carries the same weight as an objection that has sample justification: Even if a practice does not actually violate the law or even if a political subdivision recognizes the legitimacy of an objection and accedes immediately to the demands of the Attorney General, the mere entering of an objection would still preclude bailout for ten years.

Like the "no consent decree" requirement, the no-objection requirement is also counterproductive. It is never certain whether a given change in voting law or practice will violate government standards.

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[90] Sen. Subcommittee Hearing 54–59, 62–63.

[91] At one place in its report, the majority rephrase this test as follows: ". . . the jurisdiction must show that it is not . . . enacted changes which are discriminatory and, therefore, objectionable under Section 5." This summary of the test makes actual discrimination, not the interposition of an objection the real criterion. Unfortunately, however, the statute itself does not require that changes be discriminatory; it requires only that changes be objected to, not that they be objectionable.

[92] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.

Under current law, moreover, little if any opportunity exists to clear changes in advance with the Department of Justice or to have formal presubmission consultations. Jurisdiction faced with uncertainty as to the effect of new legislation can at least make needed changes in law, however, because, if the Attorney General finds some aspect of their plan objectionable, all they need to do is to submit a revised plan. Now, under the Dole-Kennedy-Mathias bill, submission of such a new plan is no longer a safe option. Uncertain about the effect of proposed changes in their law and faced with a possible ten-year bar from bailout if they make a mistake, many states and subdivisions will avoid making even needed changes. If the new bailout criteria go into effect many jurisdictions will effectively be paralyzed unless Congress or the Department of Justice itself also gives them opportunity to submit proposed changes for approval before the changes are subject to formal objection. The Dole-Kennedy-Mathias bill, however, makes no provision for such formal presubmission consultations. Assignment of federal examiners, even more than the interposing of an objection, likewise gives no real indication that discrimination has occurred. Recent practice has been to designate counties as "examiner counties" simply in order to send federal observers in since designation of examiners is a statutory prerequisite to sending in observers.[93] The language of the compromise bill does not clarify whether this kind of examiner designation would bar bailout.[94]

I have already discussed at greater length a number of other criteria that will grant third-parties and government officials almost unlimited discretion to block bailout.[95] The exercise of such discretion, standing by itself, tells us little as to whether unlawful discrimination has actually occurred in a state or subdivision. When a third party files suit alleging discrimination, it provides notice that a problem might exist. For a third party to file suit, however, in no way establishes that a problem does in fact exist. Anyone, for any reason, out of spite or envy or for political considerations, can file an action. In criteria such as these we have not a genuine attempt to discern whether exceptional conditions still exist in a covered jurisdiction as required by *South Carolina* v. *Katzenbach*. We have instead criteria designed to lock covered jurisdictions in permanently. The proposed bailout is unconstitutional.

D. ADDITIONAL PROBLEMS WITH THE PRECLEARANCE PROVISIONS AND THE BAILOUT

1. Venue

One of the basic aspects of a just trial is that there be some reasonable relationship between the facts to be determined and the location of the court which will make those fact determinations. Under both

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[93] Senate Hearings March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[94] *Id.* Reynolds observed: "Federal examiners are assigned to jurisdictions, in connection with the registration process and listing eligible voters. If that is all it pertains to, I think there are a limited number of counties that would be affected. But, on the other hand, also Federal examiners are assigned to different counties in conjunction with sending in several of the Federal observers on request to observe different elections. If the assignment of Federal examiners for that purpose were to be included as an element which would prevent bail out, there would be a large number of counties under that particular requirement and it is not clear from the language or the House report exactly what is intended there."

[95] See pp. to supra.

the Dole-Kennedy-Mathias bill and the existing law, however, the U.S. District Court for the District of Columbia has sole jurisdiction to hear declaratory judgment actions for bailout under section 4 and litigation with respect to preclearance under section 5. The Dole-Kennedy-Mathias bill would continue to impose upon counties and States the tremendous expense and delay of bringing the required battery of facts, lawyers, witnesses, and evidence to Washington. Local jurisdictions would continue to have to hire counsel licensed to litigate in the District of Columbia. Restricting venue to the District of Columbia would also make it much more difficult for an aggrieved minority voter to take an active part in an action.

Those who support retaining venue only in the District of Columbia contend that there is a need for uniform interpretation of the law relating to bailout. They suggest further that courts outside Washington cannot be trusted to make unprejudiced decisions about voting rights cases. The record of civil rights cases in the 11th and 5th circuits proves that this fear is groundless, courts in these jurisdictions having handed down many civil rights decisions that completely disregarded contrary local sentiments.[96]

While, therefore I applaud my colleagues for acknowledging the right of Congress to limit the jurisdiction of the District Courts by denying them the power to try cases under sections 4 and 5, I believe that this attempt to concentrate all of the federal judicial power in a Single Court is an abuse of that power that is contrary to the basic principles of justice. The Congress should modify the Voting Rights Act so that it will afford litigants a trial in a location near the covered jurisdiction.

2. Burden of Proof

Section 5 currently provides that a voting change by a covered jurisdiction is treated as presumptively discriminatory and that the jurisdiction must seek preclearance before it can enforce a change. In addition, in order to overcome the presumption of discrimination, a jurisdiction must prove the absence of discrimination. These two aspects of section 5 violate commonsense principles of jurisprudence. Congress should make preclearance litigation more consistent with all other litigation under American law. A presumption of discrimination violates the principle that parties are presumed innocent until proven guilty. Requiring a covered jurisdiction to prove the absence of discrimination makes the covered jurisdiction anticipate all possible contentions of discrimination by the Attorney General. This is an unreasonable burden and an inefficient way of conducting litigation.

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[96] The only case cited by the committee report in support of its contention that Southern courts are biased or incompetent in the area of voting rights has been completely distorted throughout the debate over the Act. While the Mississippi Legislature and the United States District Court in Mississippi may have committed many mistakes in the lengthy litigation to bring the Legislature into compliance with the Supreme Court's one-man-one-vote decisions, they were never found guilty of racial discrimination. The Supreme Court explicity stated, "(W)e do not reach the more particularized challenges to certain aspects of that reappointment plan made by the plaintiffs—challenges based upon claims that the plan's apportioment of some districts impermissibly dilutes Negro voting strength." *Connor* v. *Finch*, 431 U.S. 407, 421 (1977). Indeed, Justice Blackmun's concurrence, which was joined by the Chief Justice, explicity states, "I do not think the plan improperly dilutes black voting strength just because it fails to provide proportional representation." *Id.*, at 427–28 (Blackmun, J., concurring). Indeed, the only time the issue of discrimination was litigated to a conclusion, the State successfully carried the burden of providing to the District Court for the District of Columbia that it had not been guilty of discrimination in either purpose or effort. *United States* v. *Mississippi*, 444 U.S. 1050 (1980).

III. Incorporation of a "Results" Test Into Section 2 of the 1965 Voting Rights Act

The Committee's endorsement of the so-called Dole-Kennedy-Mathias "compromise" raises three fundamental issues: first, whether the incorporation of a "results" test into section 2 of the Act is constitutional; second, whether the proposed compromise simply protects voter access to the polls or whether it creates a right of group representation; and third, whether the "compromise" will require imposition of a nationwide system of proportional representation, that is, group representation according to numbers.

A. CONSTITUTIONAL ISSUES

1. The Subcommittee on the Constitution found the new "results" test unconstitutional

In its report to the full committee, the Subcommittee on the Constitution rightly concluded, after exhaustive hearings, that the House-proposed changes in Section 2, which we shall presently examine, "run substantially afoul of the provisions of the Constitution." [97] This conclusion was supported by an impressive group of constitutional scholars, representing a broad political spectrum.

I share the view of the Subcommittee on the Constitution and these witnesses that Congress lacks the authority to supplement the present intent standard under Section 2 with a results test for identifying voting discrimination, and commend Senator Hatch and the members of the Subcommittee for their conscientious and thorough attention to this important issue. The Subcommittee's Report reflects a profound understanding of our constitutional system, and I urge my colleagues in the Senate to study it carefully in their consideration of this issue.

2. Voter access versus group representation

a. The fifteenth amendment and the Voting Rights Act of 1965 protect voter access only.—The issue is not, of course, whether black Americans shall have the right to vote, to participate in the electoral process, and to enjoy protection at the polling station. No one disputes the fact that all Americans are entitled to such political liberty. The Constitution guarantees all citizens, irrespective of race or color, the right to vote. That is the purpose and object of the Fifteenth Amendment.

But the right to vote is *all* that the Fifteenth Amendment guarantees. It provides merely that,

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Unless the Committee chooses to ignore the plain and obvious meaning of these words, the right to vote means that every citizen has a right to come forward and engage in the physical act of voting—that is, marking a ballot and having it counted. It means that no one shall be denied *access* to the polling booth merely because of race and color, and

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[97] Rept. of Subcommittee on the Constitution on S. 1992, 97th Congress, 2nd Session (April, 1982), p. 67.

that all citizens shall have an *equal opportunity* to participate in the electoral process.

In keeping with these principles, section 2 of the 1965 Act prohibits the States from using any racially discriminatory "voting qualification or prerequisite to voting, or standard, practice or procedure." As the original drafters and supporters of this provision repeatedly explained in 1965, section 2 of the Act is nothing more than a restatement of the Fifteenth Amendment.[98] It addresses the problem of voter access to the polling booth *prior to* and including the final act of voting, and reaffirms the basic principle that no citizen shall be excluded from the suffrage, in any State, by means of literacy tests or other voting qualifications, prerequisites, standards, practices, or procedures that discriminate against a racial minority.

Like the Fifteenth Amendment, section 2 of the 1965 Act therefore proclaims the right of every citizen to an equal opportunity to vote. Neither the Amendment nor section 2 of the Act explicitly or impliedly asserts that the voter is entitled to any additional rights or privileges *after* his vote has been taken, or that the outcome or result of the election with respect to the success or failure of minority candidates bears any relation to an individual's right to vote. Nor is there one scintilla of historical evidence that would even hint at the possibility that the framers and backers of the Fifteenth Amendment intended to grant any particular election result to a particular class or race of voters. Indeed, they specifically considered and rejected a proposal that would have guaranteed a right of office to minority candidates.[99] Furthermore, if the effect or result of an election were determinative of whether the right to vote had been abridged, then surely the Amendment would have been more carefully drafted to include language protecting not only the right to vote, but the right to have that vote weighed, or counted in a certain manner, or separated out from the other ballots according to race. But no such language is present in the Fifteenth Amendment. Why? Because the right to vote is an *individual* right of equal access to the ballot, not the *collective* right of a particular minority to a certain share of elected officials after each individual has exercised his right to vote and gone home.

b. *City of Mobile v. Bolden.*—In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), the Supreme Court held that section 2 of the 1965 Act was simply a restatement of the Fifteenth Amendment, and that a violation of the Amendment required proof that the voting law or practice in question was based on discriminatory *intent*. At issue was whether Mobile's at-large system of municipal elections, dating back to 1911, violated section 2 of the Act, the Fifteenth Amendment, or the Fourteenth Amendment. Retracing the legislative history of section 2 of the Act, the Court asserted that section 2 merely reaffirmed the prohibitions already contained in the Fifteenth Amendment, and that the Fifteenth Amendment itself prohibited only *intentional* discrimination. "Our decisions," said the Court, ". . . have made clear

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[98] See the Supreme Court's discussion of the legislative history of § 2 in *Mobile* v. *Bolden*, 446 U.S. 55, 61 (1980).

[99] See W. Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (1965); J. McClellan, "Fiddling With the Constitution While Rome Burns: The Case Against the Voting Rights Act of 1965," 42 La. L. Rev. 43–48 (1981).

that action by a state that is racially neutral on its face violates the Fifteenth Amendment *only if motivated by a discriminatory purpose.*" 446 U.S. at 62. Nor did the Equal Protection Clause of the Fourteenth Amendment, continued the Court, render Mobile's at-large electoral system unconstitutional. Citing *Washington* v. *Davis*, 426 U.S. 229 (1976), and a number of later cases, the Court affirmed the well-established rule that "only if there is *purposeful* discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." 446 U.S. at 66. Accordingly, the Court rejected the claim that political groups have an independent constitutional claim to representation, and ruled that Mobile's at-large electoral system for city commissioners did not unconstitutionally dilute the voting strength of blacks or require the establishment of a mayor-council government that would guarantee the black population a share of elected officeholders. The evidence showed that blacks in the City of Mobile registered and voted freely, without hindrance; and in the absence of any intentional or purposeful discrimination regarding their right to vote there was no constitutional or statutory violation. Turning finally to the "extreme" and "extraordinary" theory of Justice Marshall's dissent that every political minority has a constitutional right to elect candidates in proportion to its numbers, the Court concluded that the "right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat." 446 U.S. at 77. Rejecting the claim "that the Constitution somehow guarantees proportional representation," 446 U.S. at 79, the Court observed that "the dissenting opinion erroneously discovers the asserted entitlement to group representation within the 'one person, one vote' principle of *Reynolds* v. *Sims* and its progeny." 446 U.S. at 78. An accurate reading of that decision leads to the conclusion, however, that the Equal Protection Clause guarantees each voter the right to have his vote counted *equally*, not disproportionately, with those of all other citizens; and as the Court stated in *Bolden*, it is obvious in the Mobile system "that nobody's vote has been 'diluted' in the sense in which that word was used in the *Reynolds* case." 446 U.S. at 78.

c. *Conclusion—Group representation is unconstitutional.*—In sum, the Constitution does not recognize the claim of any minority group, whether it be racial, ethnic, religious, political, or whatever, to have an inherent right to representation. This interpretation is entirely consistent with the wording of the Reconstruction Amendments and with the views of those who framed and adopted them. Moreover, such an interpretation is in keeping with our democratic principle that the majority governs, and with the views of our Founding Fathers. As Alexander Hamilton explained in *Federalist* #35,

> The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never take place in practice.

Continuing, Hamilton warned that such a system—call it proportional, group, class or race representation—would endanger our basic political liberty:

> It is said to be necessary that all classes of citizens should have some of their own number in the representative body in order that their feelings and interests may be better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free.

The Supreme Court's holding in the *Bolden* case, in my judgment, accords with Hamilton's views and is consistent with the basic political and constitutional design of our government. Our system of government, at least so far, has known nothing of a right of "group" or "class" representation in the exercise of the franchise. The goal of our democratic republic has been that no person shall be denied the right to register or to have his vote fairly counted because of his race or color. We have never undertaken to protect bloc power from dilution at the polls—I am persuaded, therefore, that the Senate should reject any "results" standard of proof for section 2 that would enshrine the principle of group representation, a principle that is hostile to our Constitution and the democratic principles of majority rule upon which it rests.

B. THE NEW RESULTS TEST—VAGUE LANGUAGE OPEN TO CONFLICTING INTERPRETATIONS

1. The genesis and content of the new language

The *Bolden* case stands for the proposition that the Fourteenth and Fifteenth Amendments, as well as Section 2 of the 1965 Act, require proof of discriminatory *intent*. In the face of this ruling, the House of Representatives adopted H.R. 3112, which seeks to introduce a "results" test under Section 2 of the Act. Under present law, section 2 provides that

> no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision *to deny or abridge* the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 4(f)(z).

The House eliminated the words "to deny or abridge" and substituted the phrase "in a manner which *results* in a denial or abridgment of." As the House Judiciary Committee explained in its report, "H.R. 3112 will amend section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under the provision." [100] The undeniable purpose of this change was to overturn the *Bolden* decision and to replace the *Court's* rule of interpretation with one preferred by the *House*—a rule which the Court had allegedly endorsed in earlier decisions. "By amending section 2 of the Act," states the House Judiciary Committee Report," Congress intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it."

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[100] H.R. Rep. No. 97-227 at 29 (1981).

2. Comes now a third version of Section 2, the Dole-Kennedy-Mathias "compromise" amendment, which the Senate Judiciary Committee incorporated into S. 1992. This amendment to section 2 of the Act consists of two parts. Subsection 2(a) sets out the principle or the standard which the Courts are to follow in determining whether a particular voting practice or procedure is "discriminatory." Under 2(a) no voting qualification, standard, practice or procedure may be applied "in a manner which *results* in a denial or abridgement" of the right to vote. Subsection a, it may thus be seen, duplicates exactly the wording of the results test contained in the House bill, H.R. 3112. The Report of the Senate Judiciary Committee explains that the purpose of subsection 2(a) is to express

> the intent of Congress in amending Section 2 that plaintiffs do not need to prove discriminatory purpose or motive, by either direct or indirect evidence, in order to establish a violation . . . Section 2 explicitly codifies a standard different from the [Court's] *interpretation* of the former language of Section 2 contained in the Supreme Court's Mobile plurality opinion [emphasis supplied].

Like the amended version of Section 2 in the House bill, then, Subsection 2a of S. 1992 seeks to reverse *Bolden* and to supplant the Court's rule of interpretation with a different one.

Subsection 2(b)—and here is the key language of the new "results" test—has been added to give the Courts a guidepost in applying the standard set forth in Subsection 2(a). According to the Committee's Report, this new subsection "delineates the legal analysis which Congress intends Courts to apply under the 'results test.' Specifically the subsection codifies the test for discriminatory result laid down by the Supreme Court in *White* v. *Register*, and the language is taken directly from that decision." Subsection 2(b) instructs the Court that, in determining whether a particular qualification, standard, practice or procedure *results* in a denial or abridgement of the right to vote, it must look to see whether, "based on the totality of circumstances," the voting qualification or practice in question has been applied

> in such manner that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by Subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice. The extent to which members of a protected class have been elected to office* in the State or political subdivision is one 'circumstance' which may be considered, provided that nothing in this section shall establish a right in members of a protected group to be elected in numbers equal to their proportion in the population [emphasis supplied].

This language, it should be noted, not only modifies the House Amendment to section 2, but also differs sharply from the "effects" test currently in place under Section 5 of the Act, which states simply that electoral changes involving a voting practice or procedure, in order to survive preclearance, must not "have the purpose and will not have

the *effect* of denying or abridging the right to vote on account of race or color."

In our attempts to construe the new "results" test we are thus dealing with at least three different standards—the "effects" test used under Section 5 of the Voting Rights Act of 1965, the "results" test passed by the House and the "results" test proposed by the Senate Judiciary Committee. Are there meaningful distinctions between these standards, and if so what are they? In partial answer to this question, the Committee explains that, "[b]y referring to the 'results' of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under section 2 from the standard for determining whether a proposed change has a discriminatory 'effect' under Section 5 of the Act." Senator Dole emphasized at the May 4 Judiciary Committee markup that his compromise measure did not create an effects test:

> The section 5 effects test is different from the results test of *White* v. *Regester*. The House report, as the Senator [Hatch] indicated, was ambiguous as to whether the *White* test or the section 5 effects test should apply. Thus, an added benefit of the compromise [is] that it makes clear that the *White* approach should apply by directly codifying language from that decision in section 2.

In other words, the Committee has rejected the section 5 "effects" test, and with it, we must therefore conclude, all of the case law baggage that goes with it. But the Committee has also failed to explain why the section 5 test is unacceptable. One possible explanation is that the section 5 test has produced the very result that the Committee has denounced throughout its Report—*viz.*, a system of proportional representation in the covered jurisdictions. This may well be the committee's intent, as I shall discuss later, but the vague wording of the Committee's amendment to section 2 leaves room, nevertheless, for the nationwide imposition of a system of proportional representation. Still, substituting the word "results" for "effects" is either a mere cosmetic change or an attempt to create a new test with different implications.

In further answer to the question of what the new "results" test means, it would stand to reason that the Committee has chosen not to use the "results" standard that the House created last fall. By amending the language of H.R. 3112 and offering a *compromise* bill, the Committee has apparently a new test, unless, in this respect too, the amendment is merely cosmetic. Subsection 2(a), as we previously noted, repeats the flatly worded "results" test that the House adopted. Does the new language in Subsection 2(b) *qualify* and narrow the application of the results standard in Subsection 2(a), or simply *clarify* it? The Committee claims that subsection 2(b) is designed simply to "spell out more specifically . . . the standard . . . To this end, the Committee adopted substitute [additional?] language which is faithful to the original intent of the Section 2 amendment as passed in the House . . ." This may be the case, but the crucial factor is that the Committee did not adopt the same language as the House. Proponents of the Dole-Kennedy-Mathias amendment, moreover, mar-

keted their measure as a "compromise," a compromise that would make the House "results" test more palatable to the members of this Committee and would in some fashion ameliorate or weaken it.

At any rate, it is still far from clear what the new compromise means. The language adopted by the Committee in Section 2b is taken not from the House bill but from *White* v. *Register*, language that has a long history in Supreme Court jurisprudence. Any court must be guided by *that* history, not by the intent of the House as transmitted through the pages of this Committee's Report.

When we examine the bill and its legislative history, however, we find that four different interpretations or sets of interpretations are plausible: an interpretation based on an objective reading of the terms employed in the amendment, the interpretation by the Supreme Court of its own language (including the widely-criticized interpretation in *Mobile* v. *Bolden*), the various interpretations advanced by the amendment's sponsors and supporters, and the interpretation contained in the Senate Judiciary Committee report. Which interpretation is the proper one?

Taken at face value, without reference to any pre-existing judicial or legislative interpretations, all that Section 2(b) may guarantee is voter *access* to the polls. Whether a particular voter does or does not have such access depends upon "the totality of the circumstances" test—a test that is certainly an implicit ingredient of numerous voting rights cases on the books dealing with the question of voter access. It is a question involving the right to vote and not the right of group representation. With the "totality of circumstances" serving as a general guideline for detecting discrimination, the specific issue a court applying the new language must address is whether the electoral process is "equally open to participation" by members of a protected class. "Openness to participation" is essentially the same thing as voter access to the electoral process. "Participation," like "access," connotes activity, in association with others, prior to and including the actual casting of a ballot or the pulling of a lever.

The Dole-Kennedy-Mathias compromise does not leave the definition of "openness to participation" to one's imagination, however. Having set forth the openness requirement, the bill goes on to define openness in such a way as to make clear that its focus of concern is not election outcome at all but unhindered access to the voting booth. The test is whether the political process is equally open to participation "*in that*," or in the sense that, its members have less *opportunity* than other members of the electorate to *participate* in the political *process and* to elect representatives of their choice." (Emphasis supplied.) The only language here that one could rationally view as guaranteeing a certain election outcome or result that might allow for proportional representation is the phrase "to elect representatives of their choice." An election outcome is, to be sure, the result of electoral participation, or the act of voting. But the conjunction which precedes the phrase "to elect representatives of their choice" is "and," not "or." The use of this conjunction is significant since the outcome of an election has no necessary connection with participation of individual voters in the electoral process. Just because a voter casts his vote a certain way and it is counted does not mean his chosen candidate will win. In terms of voter access

and participation, the question is whether the voter had a chance to vote and have it counted, not whether the candidate of his choice prevailed.

The Committee's use of the word "and" at this point suggests that it understands the difference between electoral participation and election outcome. If the Committee had used the disjunctive "or" it would have awarded the concept of electing representatives a status independent of the concept of voter participation. By using the "and," however, it has merely recognized that participation by citizens in the electoral process is the *means* our system uses to select officials and that the outcome of an election can sometimes offer evidence of systematic flaws in the process of voting, flaws that deny voters the opportunity to have their views registered.

Whether this interpretation of the Committee's language is reasonable or correct, or whether it accurately reflects the intent of the Committee, are questions that need not detain us. My point is that the Commitee's choice of wording in Subsection 2(b) is susceptible to varying interpretations. The Committee Report sheds little light on the intending meaning of much of this subsection and leaves much to the imagination. Precisely how the courts will interpret these provisions is not entirely clear to me, and I fear that the Committee's casual approach to legislative drafting will simply invite judicial legislation.

These apprehensions are further magnified by the Committee's explanation of the "objective factors" which the Courts are expected to apply in their analysis of state and local voting practices. These "factors" appear not in the statute, but in the Committee Report, and are lifted from the opinion of a Federal District Court, which the Supreme Court listed as findings in *White v. Regester*. Perhaps the most remarkable of these "factors" is the "extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." In *White*, however, the Supreme Court simply noted that the District Court had observed that a certain Mexican-American community in Texas "had *long* 'suffered from, and continues to suffer from, the results and effects of *invidious* discrimination and treatment in fields of education, employment, economics, health, politics, and others.' " 412 U.S. at 768 (emphasis supplied). Why the Committee has now altered and excluded certain factors the Report does not say. But in an accompanying footnote, citing *White* as authority, the Committee brazenly asserts that, "the Courts have recognized that disproportionate educational, employment income level and living conditions tend to operate to deny access to political life . . . where these factors are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further casual nexus between their disparate socio-economic status and the claimed denial of equal access." How these socio-economic factors square with, and apparently supersede the "totality of circumstances" standard is a mystery. In any event, the Committee seems to be contending that proof of inadequate socio-economic standards, coupled

with depressed levels of minority voter participation, are enough to prove a violation of Section 2. Does the Committee mean that, where a minority group is poor and underrepresented that it will invariably win a Section 2 suit? The Committee does not address that specific issue, but the manifest implications of its Report are truly alarming.

2. The express intentions of the amendment's supporters

From the foregoing analysis it would thus seem that the language of the amendment is open to two conflicting interpretations: first, that the amendment seeks only to protect voter access and, second, that it is designed to protect both voter access and group representation. The language of the amendment itself is ambivalent. The express statements of the supporters of the amendment and the Committee report tend to support the first interpretation—*viz.*, that the purpose of the amendment is simply to ensure free access to the polling booth.

If that is the case, then a results test confined to matters of access and participation would be consistent with the constitutional right to vote. Accordingly, the new results test would not focus on election results but on the existence of certain objectionable practices that compromise free access to the polling booths. If that is not the case, and the results test does apply to election outcome, then irreconcilable contradiction exists between the text of the amendment and the statements of the amendment's proponents.

Sections 2(a) and 2(b), for example, refer explicitly to election "results" and the election of "representatives of their choice"— words and phrases dealing, on first examination, not with the right to vote, to participate in the electoral process, or with the right of equal access to the polling booth, but with the separate and mutually exclusive "right" of minority groups representation. Yet a textural analysis of the amendment to Section 2, as we have seen, upon closer examination, suggests that the amendment is not clearly and unquestionably designed to yield a right of minority group representation.

This view that the amendment is limited to the protection of voter access and participation is strengthened and supported by language contained in the Committee Report, by statements of the framers and backers of the amendment at Committee markup of S. 1992, and by the disclaimer in the amendment asserting "that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

The Committee Report, for example, repeatedly emphasizes that "the crucial question" is "whether minorities have *equal access* to the electorial process." The Report asserts unequivocally that "the Committee amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied on *equal chance to participate* in the political process." It also states that, under the amendment, plaintiffs must prove either discriminatory intent "or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied *equal access* to the political process." Elsewhere the Report claims that "Section 2 protects the right of minority voters to be free from election practices, procedures or methods, which deny them the same *opportunity to participate* in the political process as other citizens enjoy."

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Throughout the report the concepts of voter *access* and group *representation* are generally distinguished. At one point, however, the report equates the two. "*While the presence of minority elected officials is a recognized indicator of access to the process*," asserts the Report, "the results cases make clear that the mere combination of an at-large election and lack of proportional representation is not enough to invalidate that election method." (Emphasis supplied) What, it may be asked, is this supposed relationship between the presence of minority elected officials and the right of access to the *electoral process?* The only time the presence of minority elected officials is an indicator of access to the process is when that same minority is actually a majority—which is nonsensical. The presence of minority elected officials is not an indicator of access to the process; it is more likely to be an indicator of whether minority candidates are running at-large or in single-member districts. The correlation between the voting age population and the number of registered voters; or the percentage of registered voters who cast their ballot in an election; or the location of polling stations: these are the real indicators of voter access to the process. The distinctions between access and representation are clear enough. The question arises, however, whether the architects of the amendment to section 2 and of the Report clearly understand them.

Of course, racial gerrymandering, which is the manipulation of black voting districts so as to prevent the concentration of blacks in any one district and prevent a *majority* from electing the representative of its choice is, and should be unconstitional. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Proportional representation based on race, however, is the manipulation of black voting districts so as to guarantee the concentration of blacks in one district and guarantee the *minority* election of the representative of its choice. In a sense then, proportional representation based on race is reverse racial gerrymandering, or reverse discrimination. Both kinds of gerrymandering are inconsistent with the fundamental principle of American democracy that the majority rules.

Among the sponsors and supporters of the "compromise" amendment, we find universal agreement that the amendment is designed simply to guarantee individual access, while at the same time precluding the collective right of proportional representation. Senator Dole, the prime sponsor of the "compromise" amendemnt to section 2, stressed unequivocally during the course of Committee markup that "the issue to be decided is whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access; whether it is open; equal access to the political process, not whether they have achieved proportional election results."

And in summary of his opening statement, Senator Dole again emphasized that. "Specifically, the compromise provides that the issue to be decided is whether political processes are equally open, thus placing focus on access to the process, not election results." It is noteworthy that no supporter of the Dole "compromise" took issue with this interpretation of the meaning and purpose of the amendment.

C. THE DISCLAIMER AND THE ISSUE OF PROPORTIONAL REPRESENTATION

The question now arises whether the "compromise" amendment to section 2 will require the judicial imposition of a nationwide system of

proportional representation. We should note at the outset that the Committee has chosen to place a much broader and more explicit restricion on the concept of proportional representation than did the House.

In essence, there are only two ways in which the concept of proportional representation could be applied under the statute: as a *test* to determine whether an electoral system is discriminatory, in which case the presence or absence of a system of proportional representation would serve as a measuring rod in an evidentiary finding of discrimination, irrespective of intent; or as a *remedy* to transform a "discriminatory" electoral system into a presumptively non-discriminatory system.

Both the House and the Senate Judiciary Committees have apparently ruled out the possibility that proportional representation could serve as a test of discrimination, or at least as the exclusive test. The House sought to preclude this approach in its disclaimer language:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

Similarly, the disclaimer language in the "compromise" amendment underscored the House's concern; and in an apparent effort to reassure Senators that proportional represenation would not be implemented under the Act, the Committee broadened the disclaimer as follows:

> The extent to which members of a protected class have been elected to office in the state or political subdivision is on "circumstance" which may be considered, *provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.* (Emphasis supplied.)

It is abundantly clear, however, that the new disclaimer language of the "compromise" amendment adopted by the Committee does not differ in substance from the House disclaimer—the former simply declares that no group is entitled to representation by right, and the latter that the absence of proportional representation shall not serve as a *per se* violation of section 2. What is most significant, however, is that neither the House nor the Committee disclaimer precludes the possibility, if not the likelihood, that proportional representation will be imposed as a *remedy* by the courts.

Indeed, the disclaimer in the "compromise" amendment contains no provision that would impede, hinder, or prevent a Federal District judge from issuing injunctive relief in the form of proportional representation. Judges are at liberty under this Act to impose any remedy that they please. The Committee's disclaimer asserts that members of a protected class do not have a right to proportional representation. But where does that get us, and in what way would it restrain the judiciary paricularly if the concept of vote dilution and election outcome are part of the results standard? Minority group members do not have a right to be bused outside of their neighborhoods to distant schools, but this has not prevented court-ordered busing as a remedial device in the desegregation effort. The conclusion seems inescapable that the dis-

claimer language in the "compromise" amendment is simply an ingredient of the "totality of circumstances" *test* of discrimination, and offers none of the protection that the proponents of this legislation have promised.

It is clear, then, that proportional representation can and will now be used as a remedy under this Act. The disclaimer language does not prohibit this approach, an approach that has already been employed.

In such cases as *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (5th Cir.), *Kirksey* v. *Board of Supervisors of Hinds County*, 528 F. 2d 536 (5th Cir.), and *City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.D.C. 1981). In fact, analogous disclaimer language in Title VII has not prevented courts from using affirmative action as a remedy. Section 703(j) of Title VII carefully provides that "[N]othing contained in (Title VII) shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of" a racial imbalance in the employer's work force. 42 U.S.C. sec. 2000e2(j). Even so, the Supreme Court in *Steelworkers* v. *Weber*, 442 U.S. 193, 244248 (1979) seized on this very disclaimer *against* affirmative action in Title VII to justify grafing a requirement *for* affirmative action onto Title VII. As Justice Rehnquist observed in his dissent in *Steelworkers*, such legerdemain on the part of the Federal courts is reminiscent of the doublespeak used by the government in George Orwell's novel *1984*. A case like *Steelworkers* instills little confidence that courts will take a disclaimer like that of H.R. 3112 seriously.

The Senate Subcommittee on the Constitution, therefore, understandably expressed great concern over the concept of proportional representation. Under the House language, the Subcommittee found, "Federal courts (would) be obliged to dismantle countless systems of state and local government that are not designed to achieve proportional representation." [Subcommittee Report at 2.] According to the Subcommittee, it was "difficult to conceive (both) how proportional representation by race can avoid being established in the law as the standard for identifying discrimination and, equally important, as the standard for ascertaining the effectiveness of judicial civil rights remedies." *Id.* at 3.

At Committee markup, proponents of the Dole-Kennedy-Mathias amendment assured the Committee time and again that their compromise measure would not establish a system of proportional representation or eliminate at-large elections. Senator Dole, the author of the compromise language, insisted that no court-ordered proportional representation would result from his bill:

> . . . many on the Committee have expressed legitimate concerns that a results standard could be interpreted by the courts to mandate proportional representation. That is the matter that Senator East referred to and, I think, properly so. However, it has been repeatedly pointed out that prior to *Mobile* the courts used a legal standard did not lead to court-ordered proportional representation.
>
> The supporters of this compromise believe that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists

a discriminatory purpose or intent. For this reason, the compromise retains the results standard of the Mathias/Kennedy bill. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2, which codified language from the 1973 Supreme Court decision of *White v. Regester*. *White* was a controlling precedent for voting rights cases prior to the controversial *Mobile* decision.

The new subsection clarifies, as did *White* and previous cases, that the issue to be decided is whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process, not whether they have achieved proportional election results.

The new subsection also provided, as did this *White* line of cases, that the extent to which minorities have been elected to office is one circumstance which may be considered. But it explicitly states—let me make that very clear—in the compromise that nothing in this section establishes a right to proportional representation.

Senator Dole also explained that his amendment did not prohibit courts in so many words from using proportional representation as a remedy because such a prohibition simply was unnecessary. At one point during the markup, Senator Hatch asked Senator Dole, "does your amendment (the Substitute compromise language) preclude the courts from imposing proportional representation as a remedy for a section 2 violation?" Senator Dole replied:

> It does not preclude the court. In fact, I might say that one of the suggestions offered was that we do that by statute. It has been asked, I guess in effect, why do not we expressely apply this disclaimer to remedies. Such language was considered but rejected as unnecessary.

The reason such language was unnecessary is that proportional representation would not, according to Senator Dole, be an issue under the amendment to section 2.

Other proponents of the compromise amendment to section 2 were every bit as adamant that prophecies of proportional representation and racial quotas were unfounded. In his opening statement at the April 28 preliminary markup session, Senator Kennedy, a cosponsor of S. 1992 and the compromise amendment, contended that "(t)he horror stories we have heard about racial quotas have been laid to rest in the hearing."

At the May 4 markup, Senator Mathias interpreted the bill in the same way:

> I am happy to cosponsor the Dole compromise. As a supporter of voting rights legislation since the original bill in 1965, I have never believed that proportional representation was required by the act. The Dole amendment makes that abundantly clear. It seems to me that what our goal has been is a color-free society, a color-blind society and not one that

> draws precise and definite and devisive racial lines. That is really what we are reaching for in this amendment. I am gratified that the President of the United States has seen fit to endorse this effort. I think that is an important addition to the whole debate.

Senator DeConcini noted at the May 4 markup that he would never have supported the new bill if it mandated proportional representation and threatened at large election systems like that in Phoenix, Arizona:

> While I have never believed that the original language of S. 1992 would lead to the dire consequences which have been predicted by some of the bill's opponents, I believe that the agreement which we are presented with today represents an improvement in the legislation and marks an important point in the progress of S. 1992 through Congress. The amendment would preclude speculation concerning proportional representation requirements . . . [T]he largest city in my state, Phoenix, has an at-large election system. I would never support this bill . . . if I believed that it would result in an automatic invalidation of the electoral system of the Phoenix city government.
>
> I have studied this legislation very closely. I have worked hard to help put together the agreement today. I am convinced that none of these consequences would occur under our agreed language. I can thus support the agreement without reservation.
>
> I want to add that I am pleased that the administration now agrees that the results test is the proper test and that the Senator from Kansas has forged the amendment which satisfies the administration's position and concerns about proportional representation and at-large election. This agreement is the result of hard work by reasonable people. In addition to Sentors Grassley and Dole, Senator Mathias and Senator Kennedy and others who have worked on S. 1992 deserve the credit of finding a middle position here that will insure the results test but will also ensure that the intent of the Voting Rights Act is carried out and will not mandate proportional representation.

Senator Simpson declared at markup that the Dole-Kennedy-Mathias compromise had laid his concern about proportional representation to rest:

> It has been because of Senator Dole's ability and his persistence and his canniness, I might add, that we have come up with such a fine result. My concern was always with regard to the issue of proportional representation and appropriate bailout language. . . . It has been very helpful to me to see that we were able to so well utilize the language of the *White* v. *Regester* decision, which I think was the most appropriate way to go. I am pleased that it was presented to me by Senator Dole some days ago. I am pleased that I immediately told him of my hearty reception of it. It resolved my quandary for me.

Senator Biden cosponsored the compromise because he knew it would not produce fundamental changes in our electoral process such as the elimination of at-large elections:

> I cosponsored this compromise. I would like to state the obvious. This does not change much. What it does, it clarifies what everyone intended to be the situation from the outset. That was to rectify a situation that had grown up as a consequence of a Supreme Court case, yet at the same time not thrust into the law a fundamental new requirement that neither the Civil Rights Conference nor the main cosponsor of this amendment ever intended, which was the elimnation of at-large elections.
>
> As long ago as, I guess, two months ago, I met in my office with the members of the Leadership Conference and told them I thought there was going to be a need for a compromise. They were slightly aghast that a supporter of the bill would suggest that at that time. But it was obvious from the outset that it would be required in order to allay the fears of many who have an instinct to support this legislation but a genuine fear that it may very well cause fundamental change in the electoral process that was not intended.

According to Senator Specter, another cosponsor of the compromise, statistical evidence would remain merely "part of a showing" that discrimination has occurred; the new bill would not mandate racial quotas:

> I fully expect this Committee to act promptly and favorably in reporting S. 1992 to the Senate. I do not wish to slow that process but hope that a few brief observations may dispel some of the misconceptions being voiced by opponents of this measure and speed our favorable action of this most important matter.
>
> First is the unfounded fear of "racial quotas" being invoked by some in opposition to the proposed amendment to section 2 of the Voting Rights Act. Arguments couched in terms of "logical consequences" and arithmetic extremes are entitled to little weight in the light of experience, clear legislative history of the amendment to section 2 and proven record of judicial restraint.
>
> The amendment to section 2of the Act does not introduce proof of results of discrimination in a radical way; such a method of proof has always existed. Nor does the amendment to section 2 inject numbers with any new magic. Statistical evidence will remain what it has always been, a part of a showing from which a court might conclude the racial discrimination in the denial or abridgement of voting rights has been established . . . Neither I nor any of the other cosponsors of the perfecting language to section 2 have spoken in favor of "racial quotas." Indeed, the bill passed by the House, the Senate bill 65 of us have cosponsored and the compromise language Senator Dole proposed each expressly disavows the intention and result with which opponents seek to color the debate.

In the final analysis, however, despite the disclaimer in the amendment and the assurances of the cosponsors, imposition of a nationwide system of proportional representation may inevitably flow from S. 1992 as long as it contains a concept of class "vote dilution." It is, after all, the courts which will have to devise remedies in cases where the statute is violated. The statute itself does not define the remedies available; in fact, the only guideline for remedying discrimination in the statute is a negative one, the disclaimer provision. The other guidelines in the statute, such as the "totality of the circumstances" test serve to aid in detecting violations, not remedying them. It will be the whims of countless federal judges that will have to supplement this glaring deficiency.

And what remedy will these judges provide? It is not unreasonable to suggest that the only remedy available under the new language of the Act will be court injunctions ordering local officials to dismantle their at-large electoral systems and erect single-member districts in their place.

Imagine a small American community anywhere in this country where racial and ethnic minorities participate freely and openly in campaigning and voting for candidates of their choice and where there is no evidence of any kind of any actual discrimination that hinders them from campaigning and voting. Imagine also that the electoral system of this community, like that of thousands of other communities throughout the United States, employs at-large elections. The minority citizens in this community exercise swing votes that can influence the outcome of any election and candidates eagerly seek out their support. Relatively few minority candidates have been elected to public office, however.

If courts subscribe to the twin concept of class voting rights and vote dilutions they will find statutory discrimination in this community. In that case, however, what remedy other than a system of proportional representation based on single member districts could a federal judge require? I can think of none. As an augury of things to come I suggest that my colleagues read the case of *City of Rome* v. *United States*, 446 U.S. 156 (1980). The inevitable result of this unconstitutional and undemocratic legislation will, I fear, be the very one that the sponsors of this legislation so vehemently deny.

Modern history is replete with examples of revolutions working themselves out in ways that their leaders and supporters never intended. This well-intentioned but misguided assault on the American system of government will no doubt add yet another chapter to the history of revolutions gone astray.

Congressional Reversal of City of Mobile v. Bolden

This brings us finally to three major constitutional issues which the "compromise" amendment to section 2 raises: (1) whether this amendment is intended to reverse the *Mobile* decision; (2) whether Congress has the authority to reverse it; and (3) if so, whether this amendment does in fact overturn *Mobile*.

We begin with the question of whether the amendment proposes to reverse *Bolden*. The *Bolden* case, as we have noted, explicitly and directly affirms that a denial or abridgement of the right to vote requires proof of discriminatory *intent*. The Committee has changed

the wording of section 2 in an effort to lower the standard of proof to discriminatory *result*. In seeking to justify this radical departure from existing precedent, the Committee offers a number of peculiar "findings" that warrant careful inspection.

First, the Committee contends that *Bolden* was incorrectly decided because the Court's rejection of the "results" test contravened the Court's own prior holdings and those of lower Federal courts. "Congressional action," asserts the Committee, "is necessary to restore the pre-*Bolden* legal standard in cases brought under section 2." Citing dicta from *Reynolds* v. *Sims*, 377 U.S. 533 (1964), *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), *Burns* v. *Richardson*, 384 U.S. 73 (1966), *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), *Abate* v. *Mundt*, 405 U.S. 182 (1971), *White* v. *Regester*, 412 U.S. 755 (1973), and *Chapman* v. *Meier*, 421 U.S. 1 (1975). together with a number of lower Federal court decisions, the Committee concludes that "prior to *Bolden*, plaintiffs in dilution cases could prevail by showing either discriminatory results *or* intent." The Court's insistence in *Bolden* that discriminatory intent must be shown to establish a violation of section 2, or the Fourteenth or Fifteenth amendments, was accordingly an aberration in the line of decisions and, claims the Committee, "a marked departure from earlier Supreme Court and lower court voting dilution cases."

However accurate the Committee's novel constitutional theories may be, the important consideration to keep in mind is that the Supreme Court does not accept them. The Court has indeed considered and rejected the interpretations which the Committee wishes to engraft on these cases. The Committee Report freely acknowlegdes as much when it admits to abandoning the intent test laid down in *Bolden* in favor of a new test allegedly drawn from *White* v. *Regester*, 412 U.S. 755 (1973). The problem with the Committee's approach, however, is that it places a different interpretation on *White* than does the Supreme Court, which decided the *White* case. In *Bolden*, the Court asserted that "*White* v. *Regester* is . . . consistent with 'the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory *purpose*." *Mobile* v. *Bolden*, 446 U.S. at 69.

We are thus confronted with two differing interpretations of the same case law, interpretations separated from one another by an ocean of substantive meaning. Which interpretation should prevail? The language used in the statute—that is, the language of the *White* decision—is language that was developed and interpreted by the Supreme Court and which therefore carries with it the Court's understanding of the law and the subtle nuances that the Court itself has appended to the language. In the final analysis, then, the Court's interpretation must prevail in construing the new wording of Section 2 and not the novel interpretation introduced in a Committee Report. If the Committee has misconstrued the language of *White* and its progeny, as it most surely has in this Senator's judgment, the Court will have to adhere to the correct meaning of the terminology that it developed.

Notwithstanding this overt attempt by the Committee to impose its constitutional interpretations upon the Court, the Committee boldly insists that "the proposed amendment to section 2 does not seek to reverse the Court's constitutional interpretation." This is so, claims the

Committee, because "the proposal is a proper statutory exercise of Congress' enforcement power . . . and is not a redefinition of the scope of the constitutional provisions."

The Committee's rationale for this peculiar interpretation of Congress' powers, if I understand the Report correctly, goes like this: Section 2 as orginally drafted in 1965 was intended to include a results test. The Supreme Court misconstrued this legislative intent in the *Bolden* case. To restore section 2 to its original purpose, it is now incumbent upon Congress to rewrite section 2 so as to clarify Congress' real intentions. This action is proper because Congress is simply changing a statutory provision. Although Congress cannot, states the Report, "alter the judicial interpretation in *Bolden* of the Fourteenth and Fifteenth amendments by simple statute," it is free to alter the judicial interpretation in *Bolden* of the statute involved, by changing the statute.

This mode of reasoning is, of course, fatally flawed because, as we have earlier noted, the Court was interpreting not only section 2 in *Bolden*, but also the Fourteenth and Fifteenth amendments. Both the statute and the amendments, according to the Court, require an intent test. Irrespective of the language contained in section 2, we are nevertheless confronted with the Court's interpretations of the amendments, which do not change merely because the statute upon which they rest has been changed. The Committee endeavors to sidestep this problem by claiming that it can also change the substantive meaning of the Fifteenth Amendment by simple statute, through its broad enforcement power. "The Court," claims the Committee Report, "has long held that Congress need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the Congressional determination that the legislation furthers enforcement of the Amendment. The Voting Rights Act is the best example of Congress' power to enact enabling legislation *that goes beyond the direct prohibitions of the Constitution itself.*" (emphasis supplied).

What we have here, then, is a call to abandon the Constitution, an assertion of unbridled power by Congress to rewrite a provision of the Constitution by mere statute. The Commission seems to have forgotten that Congress' power is limited; indeed it seems to have forgotten that our Constitution itself rests on the principle of limited government and limited power. Aside from this, however, the Committee seems also to have forgotten that the Fourteenth Amendment played an important role in the *Bolden* case; for the Court's rejection of the "results" test in *Bolden* was based on an interpretation of the Fourteenth Amendment as well as the Fifteenth. Perhaps the Committee's omission is not unintentional, however. There is at least some judicial precedent to support the view that Congress may go beyond the express prohibitions of the Fifteenth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). That interpretation is highly controversial and was rendered under unique circumstances. There is no precedent of this kind, however, that sanctions the right of Congress to step outside the boundaries of the Fourteenth Amendment.

The Committee's attempt to persuade us that the Constitution is amenable to the interpretations embraced by the Report recalls to mind Alice's encounter with Humpty Dumpty in Lewis Carroll's *Through the Looking Glass:*

"When I use a word," said Humpty Dumpty, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is master, that's all."

Certainly Congress has a role to play in interpreting the Constitution. We do not legislate in a vacuum and must necessarily keep the Constitution in view, as a standard to follow when we enact legislation. Moreover, if Congress is persuaded that its understanding of a particular constitutional provision is the correct one, it should press the issue, even in the face of what appears to be a contrary interpretation by the Supreme Court in an earlier case; for the facts are never the same, the personnel on the Court changes, and the Court may even be persuaded to abandon a precedent because it was erroneous in the first place. Congress should therefore not abandon its interpretation of the Constitution merely because it anticipates a hostile reception from the Supreme Court. At the very least, Congress has the right to express its view of the Constitution, in the form of a legislative enactment, and await the Court's answer when the act is reviewed. And a determined Congress may go even further if it does not wish to accept the Court's interpretation, by proposing an amendment to the Constitution, or by withdrawing its jurisdiction over a certain class of cases and transferring it to the State courts. Not every constitutional question must be ultimately determined by the Supreme Court, and even the Court itself has refused to exercise that power under the so-called "political question" doctrine.

So I do not fault the Committee for attempting to persuade the Court that the Court was wrong, and in fact welcome this renewed interest among my colleagues in reasserting our right to interpret the Constitution at the law-making stage. But let us be candid with ourselves and with the American people, and frankly admit that the object of this legislation is to overturn the Supreme Court's interpretation of the Constitution in *Bolden*. To claim, as the Report does, that the "compromise" amendment seeks only to redefine the law, and is different in meaning and intent from the various court-stripping proposals currently pending in Congress, is no more accurate or helpful to a public understanding of what we are doing here than is the Report's exposition of S. 1992.

For the reasons stated, I respectfully urge my colleagues to reject S. 1992 as unconstitutional and unwise.

Respectfully submitted,

JOHN P. EAST,
United States Senator.

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Calendar No. 598

NOTICE: In lieu of a star print, errata are printed to indicate corrections to the original report.

97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-417

MAY 27 (legislative day, MAY 25), 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

[To accompany S. 1992]

CORRECTIONS

On page 4 of the Report, the recorded vote in paragraph "8" should be 15–3, instead of 13–5.

On page 8 of the Report a new paragraph "9" should be inserted which reads, "An amendment that would have changed the burden of proof requirements under Section 5 (defeated by a vote of 12–6)."

In Section XI of the Report, "Recorded Votes in Committee," recorded votes numbers 8–10 should be deleted and replaced with the following:

8. East amendment to change the burden of proof requirements under Section 5 of the Act.

YEAS	NAYS
Laxalt*	Mathias
Hatch	Dole
East	Simpson
Denton	Grassley
Heflin	Specter
Thurmond	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Leahy
	Baucus

Amendment defeated by a vote of 12–6.

89-010 O

9. East amendment to change the venue prescribed under Section 5 of the Act.

YEAS	NAYS
Laxalt*	Mathias
East	Dole
Denton	Simpson
Heflin	Grassley
Baucus	Specter
Thurmond	Biden
	Kennedy
	Byrd
	Metzenbaum
	DeConcini
	Leahy
	Hatch

Amendment defeated by a vote of 12–6.

10. East amendment that would have changed venue for suits brought to enforce Section 2 of the Act.

YEAS	NAYS
East	Mathias
Denton*	Hatch
Specter	Dole
Thurmond	Simpson
	Grassley
	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Laxalt*
	Heflin
	Leahy
	Baucus

Amendment defeated by a vote of 14–4.

11. East amendment to make Section 5 of the Act apply to every single political subdivision in the Nation.

YEAS	NAYS
East	Mathias
Denton*	Laxalt*
Thurmond	Hatch
	Dole
	Specter
	Simpson
	Grassley
	Biden
	Kennedy
	Byrd*
	Metzenbaum*
	DeConcini*
	Leahy
	Baucus
	Heflin

Amendment defeated by a vote of 15–3.

The Committee then ordered the bill to be favorably reported to the full Senate by a vote of 17–1.

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